(18,842.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 614.

AUGUST CLIFF, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the district court of the United States for the northern division of the northern district of Illinois, begun and held at the United States court-rooms, in the city of Chicago, in said division of said district, on the third Monday of December (it being the fifteenth day thereof), in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-seventh year.

Present: The Honorable Christian C. Kohlsaat, judge of said court and the Honorable J. Otis Humphrey, judge of the district court of the United States for the southern district of Illinois, sitting in this court by designation, presiding, John C. Ames, marshal for the northern district of Illinois, and T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois.

2 THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Be it remembered that heretofore, to wit, on the 22nd day of January, A. D. 1903, it being one of the days of the December, 1902, term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms in the city of Chicago, in said division of said district on the third Monday of December, it being the fifteenth day thereof in the year of our Lord one thousand nine hundred and two and of the Independence of the United States of America the one hundred and twenty-seventh year, before the Honorable Christian C. Kohlsaat, judge of said court, presiding, the following order was had and entered of record in said cause, to wit:

3 THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Comes S. H. Bethea, Esq., district attorney and presents the affidavit of Joseph A. Painter and a criminal information against August Cliff based thereon and asks leave of the court to file the same; whereupon it is ordered by the court that said affidavit and information be filed and the cause placed upon the dockets of this court.

And afterwards to wit on the 22nd day of January, A. D. 1903 said affidavit was filed, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *sct:*

Joseph A. Painter being first duly sworn, on oath, deposes and says that he resides in the city of Chicago, Illinois; that he is a deputy internal-revenue collector in and for the first internal-revenue collection district of Illinois; that on, to wit, the 22nd day of December, A. D. 1902, August Cliff in the city of Chicago, in the division and district aforesaid, and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; that the said August Cliff at the time and place aforesaid, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not
4 been stamped according to law, that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff, then and there well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil; that said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow; that said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid, by Wm. J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois; that said oleomargarine was then and there purchased and received for sale by the said August Cliff as aforesaid from the said Wm. J. Moxley, a corporation as aforesaid; and that when said oleomargarine was purchased and received for sale as aforesaid, it was contained in a new wooden original manufacturer's package to which, as the said August Cliff then and there well knew, no coupon, stamp or stamps in the sum of ten cents for each pound of oleomargarine so contained therein had then and there been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein.

The said Joseph A. Painter therefore prays that the said August Cliff may be apprehended and held to answer said charge and to be further dealt with according to law.

Dated this 23rd day of December, A. D. 1902.

JOSEPH A. PAINTER.

Subscribed and sworn to before me this 23rd day of December, A. D. 1902.

CHAS. A. BUELL,
Deputy Clerk U. S. Dist. Court, Northern Dist. of Illinois.

Endorsed: U. S. district court for the N. dist. of Ills., N. div. No. 3415. The United States *vs.* August Cliff. Affidavit. Filed Jan. 22, 1903, at 2 o'clock p. m. T. C. MacMillan, clerk. (B.)

5 And afterwards, to wit, on the 22d day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a criminal information, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the December Term, in the Year of Our Lord Nineteen Hundred and Two.

NORTHERN DISTRICT OF ILLINOIS, } *sct:*
Northern Division, }

Be it remembered, that S. H. Bethea, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the division and district aforesaid, on this twenty-second day of January, in this same term, and for the said United States gives the court here to understand and be informed, that August Cliff, late of the city of Chicago, in the said division and district, on the twenty-second day of December, in the year of our Lord nineteen hundred and two, at Chicago aforesaid, in the division and district aforesaid and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; and that the said August Cliff then and there, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not been stamped according to law,—that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleo-
6 margarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and then and there was purchased and received for sale by the said August Cliff as aforesaid from the said William J. Moxley, a corporation as aforesaid, and, when so as aforesaid purchased and received for sale, was contained in a new wooden original manufacturer's package to which, as he, the said August Cliff then and there well knew, no coupon stamp or stamps, in the sum of ten cents for each pound of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said August Cliff, in this

behalf, to make him, answer to the said United States concerning the premises aforesaid.

S. H. BETHEA,
United States Attorney.

Endorsed: No. 3415. U. S. district court for the N. dist. of Ills., N. div. The United States *vs.* August Cliff. Information on sec. 11, act of Aug. 2, 1886, as amended by sec. 3, act of May, 9, 1902 internal-revenue laws. Filed in open court Jan. 22, 1903 at 2 o'clock p. m. T. C. MacMillan, clerk S. H. Bethea, U. S. att'y N. dist. Ill.

7 And afterwards, to wit, on the 22nd day of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Comes the United States by S. H. Bethea, Esq., district attorney, comes also the defendant, August Cliff, in his own proper person as well as by counsel and said defendant being arraigned upon the information filed herein against him pleads not guilty thereto and the parties having waived the intervention of a jury, the cause is submitted to the court for trial, whereupon, after the hearing by the court of the evidence by the parties adduced and arguments of counsel, the said defendant by his attorney moves the court to find the defendant not guilty, which said motion is by the court overruled and denied, to which ruling of the court said defendant by his attorney duly excepts. Thereupon the court being fully advised in the premises finds the defendant August Cliff guilty as charged in the information. Thereupon the defendant by his attorney enters his motion for a new trial herein which said motion after hearing of arguments and due consideration by the court is overruled and denied, and thereupon said defendant by his attorney enters his motion in arrest of judgment which motion in arrest after hearing of arguments and due consideration by the court is overruled and denied, and said defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and judgment of the court upon the finding of guilty herein as aforesaid that the defendant August Cliff forfeit and pay to the United States a fine in the sum of fifty dollars besides the costs in this behalf expended, and that execution shall issue therefor.

8 And afterwards, to wit, on the 27th of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Come the parties by their attorneys and on motion it is ordered by the court that leave be and it hereby is given said defendant to file his waiver of jury, motion to find defendant not guilty, and motion for a new trial herein, *nunc pro tunc* as of January 22, 1903.

And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a waiver of jury trial, the same being in the words and figures following, to wit:

9 UNITED STATES OF AMERICA
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA,
vs.
AUGUST CLIFF. } Information.

Waiver of Jury Trial.

Now comes the respective parties and, by their counsel, waive a trial by jury herein and agree to submit the issues herein to the court.

Dated January 22, 1903.

S. H. BETHEA,
U. S. Att'y, for the Government.
WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
For the Defendant.

Endorsed: District court of U. S. Northern district of Ill., northern division. Waiver of jury trial. United States of America *vs.* August Cliff. Gen. No. 3415. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc* Jan. 22, 1903.

10 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion to find the defendant not guilty, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1892.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Motion to Find Defendant Not Guilty.

Comes now the defendant, by his counsel, and, upon the evidence before the court, moves the court to find in favor of the defendant and to render a verdict and judgment of not guilty and that he be discharged, because the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposed a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures and compounds which may be submitted for his inspection in contested cases are to be taxed upon this act," and provides "that his decision in matters of taxation under the act shall be final," *it* is in contravention of the Constitution of the United States and of the amendments thereto and is illegal and void, for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

Second. The act is an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act invests inferior executive officers with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights;

11 Fourth. The act so arbitrarily discriminates against oleomargarine in favor of butter in the United States as to be repugnant to *the* those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE.
FRANCIS J. KEARFUL.
CHARLES C. CARNAHAN.
DELAVAN B. COLE.

Endorsed: District court of U. S., northern district of Ill., northern division. Motion to find the defendant not guilty. United States of America, *vs.* August Cliff. Gen. No. 3415. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc*, Jan. 22, 1903.

12 And afterwards, to wit, on the 22nd day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion for a new trial, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.
(2.) The finding is contrary to the law.
(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: District court of U. S., northern district of Ill., northern division. Motion for new trial. United States of America *vs.* August Cliff. Gen. No. 3415. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc*, Jan. 22, 1903.

13 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a bill of exceptions, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

Bill of Exceptions.

Be it remembered, that the above-entitled cause, coming on for trial on the 22nd day of January, A. D. 1903, the same being one of

the days of the regular December, 1902, term of said court, before the Hon. Christian C. Kohlsaat, judge of said court, the Government appearing by its counsel, Solomon H. Bethea and Oliver E. Pagin, and the defendant appearing in person and by his counsel, William D. Guthrie, Francis J. Kearful, Charles C. Carnahan and Delavan B. Cole, the following proceedings were had:

Trial by jury was waived by a stipulation in writing duly signed and filed and the cause was submitted to the court.

14 Thereupon, the Government, to maintain the issues on its part, introduced the following evidence:

JOSEPH A. PAINTER, a witness produced, sworn and examined on behalf of the Government, testified as follows:

Direct examination by Mr. PAGIN:

My name is Joseph A. Painter. I am deputy collector of internal revenue for the first district of Illinois, embracing the city of Chicago. I know the defendant, August Cliff. He is a general grocer, and retail dealer in oleomargarine, corner of Randolph and State street, Chicago. On December 22, 1902, I called at his place of business in the course of my duties and found this 10-pound package of oleomargarine which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax-paid stamp of ¼ of a cent a pound. The contents of the package, which is here in court, was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil. The color was presumably imparted by the palm oil. That was the only coloring ingredient that would give it that shade. The oleomargarine was manufactured in December, 1902, by Wm. J. Moxley, incor-

15 porated, factory No. 5, corner of Clinton and Randolph streets, Chicago. The package was put up marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of Secretary of the Treasury and Commissioner of Internal Revenue except that it bore only a tax-paid stamp of ¼ of a cent per pound. The defendant admitted to me at the time that he purchased and received from the Moxley Company the oleomargarine in question for the purpose of sale as oleomargarine, knowing its character and ingredients and the amount of tax paid thereon. I have been instructed by the Commissioner of Internal Revenue that palm oil does produce an artificial coloration in oleomargarine that causes it to look like natural butter of a shade of yellow. The Commissioner ruled that palm oil was an artificial color, and if used in the manufacture of oleomargarine in small quantities it would subject the product to the tax of ten cents per pound. This ruling is contained in the following letter from the Commissioner to W. J. Moxley, of August 11, 1902, which is admitted in evidence and is in the words and figures following; to wit:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *August* 11, 1902.

16 SIR: On June 23, 1902, you submitted to this office a sample of crude palm oil for inspection by the chemist of the bureau with the view of ascertaining whether or not such palm oil would be considered a legitimate incredient of oleomargarine.

After making full examination and chemical analysis of the samples submitted, you were notified by office letter of July 2 that the oil was rancid, of bad taste and smell, and that it was considered by this office wholly unfit for use in oleomargarine.

On July 11 you submitted a sample of what you termed "refined palm oil," and asked for expression as to whether this oil would be classed as a vegetable oil and whether in its present condition it would be considered a suitable and proper ingredient of oleomargarine. This sample was examined and subjected to chemical analysis in the office laboratory. It was found to contain a large amount of free fatty acid; it was by no means free from disagreeable odor and taste, and was of a very deep red or orange color. If oil like the sample were used in any considerable quantity as one of the fatty ingredients, it would undoubtedly cause a condition under which this office would rule that the oleomargarine contained an ingredient deleterious to public health and offensive in taste and odor.

17 After this second sample had been submitted and the matter was under advisement in this office, fullest opportunity was given for hearing and oral argument by you and others interested upon the subject of the use of palm oil in the manufacture of oleomargarine. As a result of the examination made of the samples of oil submitted, it was virtually agreed at the hearing that palm oil of the grade of the samples examined could not be introduced into the manufacture of oleomargarine in considerable quantities as oleo oil, neutral oil, cotton-seed oil, butter, or milk is now introduced, but only in quite small quantities or proportions. It was further found by examination in this office that, take any given quantity of unartificially colored oleomargarine—the same being virtually white in appearance—if three-tenths of 1 per cent. of the palm oil submitted was introduced therein it would give to the finished product a shade of yellow, and that the finished product would in appearance be in imitation or semblance of butter. In other words, that if to the finished sum total of uncolored oleomargarine in weight 1,500 pounds there was added a little less than 5 pounds of this palm oil, the result would be a marked change in color, there being secured through the introduction of the palm oil to the finished pro-
18 duct, a shade of yellow, causing the finished product to look like butter.

Under the law a tax of 10 cents per pound is assessed against oleomargarine unless it is free from artificial coloration that causes it to look like butter of any shade of yellow, in which case the tax is one-fourth of 1 cent per pound.

This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound.

Respectfully, J. W. YERKES, *Commissioner.*

Mr. W. J. Moxley, Chicago, Ill.

In answer to a question by the court, the district attorney stated that it was not claimed that the defendant offered the article for sale as butter.

Thereupon the Government rested.

19 Thereupon the defendant, to maintain the issued upon his part, offered and introduced the following evidence:

ANDREW E. BERGLAND, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew E. Bergland. I am foreman for the Moxley butterine factory, and have been so employed for eighteen years. I superintend the manufacture of the article in this package here in question. Its ingredients and their proportions are: Three pounds of oleo oil; 1 pound and twelve ounces of neutral lard; two pounds of cotton-seed oil; one pound and fourteen and a half ounces of milk; one pound and four ounces of salt; one and one-half ounces of palm oil. The article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the "Daisy" grade, the lower grade. It is a substitute for butter

20 WILLIAM HOSKINS, a witness produced, sworn and examined on behalf of the defendants, testified as follows:

Direct examination by Mr. KEARFUL:

My name is William Hoskins. I am a chemist and have been for the past twenty years. I am familiar with the chemical properties of oleomargarine or butterine and with the chemical properties of butter. My knowledge of those properties is based upon the result of actual contact in the laboratory, chemical analysis and microscopical examination, and my general education and experience as a chemist. The difference in the chemical properties of an article manufactured according to the formula testified to by Mr. Bergland and the properties of good butter would be due to a difference in

proportion of some of the constituents. More particularly those constituents which are peculiar to butter, such as butyrin and some other allied substances, caproin and caprin, in very small proportions, which are characteristic of butter. The principal characteristic of butter is butyrin. The others not characteristic of oleomargarine are very small in proportion. In the fat of butter the proportion of this characteristic constituent, butyrin, varies somewhat but it would be approximately six per cent. It is not entirely absent from oleomargarine or butterine. There would not be so much of it, but inasmuch as the oleomargarin-
21 is churned up with milk or cream there must necessarily be a small proportion of butter fat incorporated with the product; therefore it would contain the same constituents although in much smaller proportions. The other substances characteristic of butter are infinitestimally small. There is nothing, in my opinion, in the difference between the properties of oleomargarine and good butter which is unwholesome or deleterious. I am familiar with the chemical properties of the substance known as palm oil. The difference between the chemical properties of palm oil and good butter is greater than in the comparison made with butterine or oleomargarine, because, so far as it has been observed, palm oil contains none of these characteristic constituents that I refer to, but it does contain the same constituents as the other fats, olein, stearin and palmitin except in proportion. The elements which are absent in palm oil, such as butyrin, give to butter its characteristic flavor.

I have taken pains to investigate the subject of palm oil so as to ascertain its origin, chemical properties and uses. The palm oil that we know as the palm oil of commerce is the product of the fruit portion of the fruit of a particular kind of palm that grows in certain portions of east Africa; whether it grows in other parts of the world I do not know. I refer to the fruit portion as distin-
guished from the seed, which is not the source of the oil referred
22 to. It is used by the natives of that country, where it is produced, to mix with their food. It is an edible oil. In my opinion there is nothing deleterious or unwholesome in the use of palm oil, in the proportion in which it is used in this formula.

Cross-examination by Mr. PAGIN:

A very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such that it may be used to make oleomargarine or white substances to look like butter. It affects the taste but little, although it does affect the taste.

Q. Do you know whether it affects the taste so as to make it taste more like butter or less like butter than the ingredients of the oleomargarine?

A. I can hardly answer that question, because the taste of butter varies within such a wide range that I might say that sometimes I

think a small addition would make it taste more like butter and sometimes less like butter.

Q. There is a difference between the taste of oleomargarine and butter, isn't there?

A. If oleomargarine is well made in my experience with it, it very closely resembles the taste of butter.

23 MARK DE LA FONTAINE, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

The COURT: Is this for the purpose of corroborating this last witness?

Mr. KEARFUL: Yes, your honor.

The COURT: The Government does not intend to use any witness on this point?

Mr. BETHEA: No sir.

The COURT: I do not see any use of multiplying it.

Mr. KEARFUL: I will have to use the Professor on a point that was not covered by the last witness.

The COURT: Very well.

Direct examination by Mr. KEARFUL:

My name is Mark de la Fontaine. I am a chemist and have been for fifty years. I am and for several years have been familiar with the chemical properties and generally with the substance known as palm oil. As to its being a proper substance for use as food, I know that it is quite as digestible as any other of the fats that we
24 use for food, as lard, and even butter. I know it from my own experience. The color is variable. The crude oil has a very strong, dark-orange color, but after being refined, that color becomes lighter, and the oil may be so treated as to become colorless, or retain only a faint-yellow color. As to the propriety of using in oleomargarine a large proportion of palm oil from which the color has been refined, there would be no objection to it as a food, for this reason, that in addition to its color the palm oil has also a particular flavor, but the process of refining, as far as I understand it, does away both with much of the flavor and much of the color, so that refined palm oil ultimately will find its way on the market, as a regular article of food, perhaps not in this country where we have lard in plenty and other fats, but in other countries.

Cross-examination by Mr. PAGIN:

As to the price of palm oil, I know it is very cheap because it is largely used in the old country for the manufacture of soap, and even now in this country, but I do not know how much it would cost.

Q. But if it has any color, it is some shade of yellow, is it?

A. It is yellow. The crude oil is very dark-orange red.

Q. Orange is a shade of yellow, isn't it?

A. Yes, sir, orange is a shade of red, too; it is between red and yellow.

Q. Well, a mixture of red and yellow?

A. Yes, sir.

25 HENRY BOEHMER, a witness produced, sworn and examined on behalf of defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Henry Boehmer. I live at Barrington, Illinois. I am a manufacturer of creamery butter, and have been engaged in that business about 24 or 25 years. I am familiar with the business of manufacturing creamery butter generally throughout the western portion of the United States.

Q. Are you able to state the custom of butter manufacturers in regard to coloring butter throughout the year?

Mr. BETHEA: I object to that. It seems to me that is entirely immaterial and irrelevant and incompetent.

The COURT: Yes, I do not think that is proper. You are getting at these ingredients and what palm oil is used for.

Mr. KEARFUL: It seems to me, your honor, that it is necessarily a part of our case; and, while your honor may differ with me, I would like to have this evidence in.

Mr. BETHEA: Make your offer.

The COURT: The object is to show that there is artificial coloring matter used in the manufacture of butter,—is that it?

Mr. KEARFUL: Well, it goes a little further than that. I want to state the proposition to the court. Now, this case will have to
26 turn, your honor, upon the effect of this statute as it may be observed by the court in its operation, and if it is observed to operate so as to prevent the people of the country from obtaining oleomargarine in the way in which they want it, and to destroy the business of oleomargarine because the manufacturer cannot sell it to the people in the way in which they want it, that will be one branch of our contention that it is a discrimination which deprives these parties of their liberty and property without due process of law. Now, the fact being that whether it is butter or whether it is oleomargarine the people want it a uniform shade of color throughout the year, and they won't buy white butter or they won't buy white oleomargarine; and in the presence of that fact, Congress places such a tax upon one of those articles as to prevent its being used and sold. It is therefore necessary to show as an essential fact that oleomargarine and butter, one used as a substitute for the other, are commonly colored a uniform color throughout the year, because that is the demand of the consumers; and I want to say this, that if it should turn out that our contention is correct—if your honor should take the wrong view of this matter, as courts may do sometimes—it would only result in this case being sent back for further hearing in order to determine the facts upon that point.

The COURT: I think you may make what showing you please, and then they may move to strike it out.

Mr. BETHEA: We do not care to have it go in, but we
27 want our objection in where we think the evidence is improper.

It was agreed that it should be understood that the Government's counsel objected to this line of testimony; but that it should be received and the right of the Government reserved in all cases to move to strike it out.

Mr. KEARFUL: What is the custom in regard to coloring butter amongst manufacturers?

A. Why, it is colored with a color, artificial color that we buy.

Q. To what extent throughout the year is it colored?

A. Well, there is a difference. Different places require different colors, but as a general rule, what we call a June color. It is the color what we should give it here. Grass should give that color to butter. That is why we call it June color.

Q. Do you try to obtain the color of June butter?

A. Yes, that is what we call the June color.

The COURT:

Q. Don't you color June butter also?

A. Yes, sir, but not as much as butter made in December. That is the only difference.

Mr. KEARFUL:

Q. What is the natural color of butter in December and other months of the year when cattle do not get clover and grass?

A. At this time of the year and the time of the year when there is no grass, it is, you might say, white, or pretty near a perfect white.

Q. In the creamery business is there any demand for butter in its natural condition and with its natural color?

A. No, sir.

Q. Do you know whether there is any demand amongst butter manufacturers for uncolored butter?

A. Not that I know of, I don't think there is, because what I have seen is all colored.

28 Q. Have you any knowledge of the character of the butter to be found upon the tables throughout the United States or any part of it?

A. Why, all the butter I have seen is colored, more or less. Different places has different colors sometimes, different sections of the country each has a uniform color that it demands.

Cross-examination by Mr. BETHEA:

Q. They do not color butter in the summer time when cows are eating clover, do they?

A. Yes, sir.

Q. Why do they do that?

A. Why—I never made butter, or saw butter made at any time of the year but that comes to what we call the June color, they all color it some. But that time of the year, perhaps they only use—oh, about a quarter (that is, when there is clover or grass) of the amount that they use at this time of year.

Q. Doesn't clover make the butter naturally a butter color, a butter yellow?

A. It don't make it as high color as the people want it.

Q. Well, you do not mean to say that they do not use any butter in the natural condition at any time of the year, that nobody uses it?

The COURT: In the market, he says.

Mr. BETHEA:

Q. In the market. What do you say about that?

29 A. Why, I do not think that there is one farmer out of a thousand that puts on the market the kind of butter we make but that is colored the year around.

Q. You do not mean to say that in the market there is no natural butter at any time of the year?

A. Why, there is natural butter, but it is colored.

Q. I mean with the natural butter color. Suppose it is June or July?

A. I do not think there is.

Q. Isn't there some butter sold anywhere in June or July that is not colored?

A. Not what we call the regular butter put on the market.

Q. Don't the farmers bring in butter and sell it?

A. I do not think they do very much. I think most of the farmers' butter is colored.

Q. What is the use of coloring it in the summer time when it is naturally the color that gives the reputation to butterine?

A. Because people want the color, so we color it.

The COURT: So as to make a uniform color?

A. Yes, sir, that is the aim of coloring June butter.

Mr. BETHEA:

Q. You can remember, can't you, when butter was sold in its natural way?

A. Why, I do in the old country, but I do not remember in this country. I have lived in this country about thirty years.

Q. Now, aren't you mistaken about that?

A. No, I am not, because I have been in business twenty-six years, I think,—twenty-five or twenty-six.

30 Q. Do you mean to say that thirty years ago that the people in this country, the farmers, people who produced butter, colored it in the summer time?

A. I do not say thirty years, but I say twenty-six, because I have been in the business twenty-five or twenty-six years.

Q. Well, this butter was a pretty good article that was not colored, wasn't it, in its natural condition?

A. Why, as far as taste the article is all right.

Q. Yes, and looks? Take the summer butter, how could you improve on that, natural butter, where the cows have been eating grass and clover?

A. Why, it might be all right, it would be all right for me, because I would know what it was. But for the people that we sell it to, they would rather have the color.

Q. Why? Are they afraid it is oleomargarine if it is not colored?

A. Well, that I do not know.

Mr. KEARFUL: Does the idea of the uniformity of the butter which comes into the market have anything to do with coloring butter which is already naturally a butter color?

The COURT: He has answered that the object of coloring it is so as to make it uniform.

Mr. BETHEA: Yes, he stated that. Now, I move to strike out his testimony as incompetent, irrelevant and immaterial.

The COURT: Of course, as an abstract proposition, it is hard to see why there should be any difference between coloring oleomargarine and coloring butter, but I cannot see but that Con-
31 gress, in the exercise of its police powers, for various purposes, among which might be the assistance in detecting the difference between butter and oleomargarine, and other purposes incident to the detection of oleomargarine to prevent imposition on the public——

Mr. KEARFUL: Pardon me one moment, if your honor will.

The COURT: Yes.

Mr. KEARFUL: I suggest that ruling upon this objection might be reserved until the evidence is all in, when the matter can be argued and the points presented.

The COURT: Have you got more evidence on this point?

Mr. KEARFUL: Yes, sir.

The COURT: I thought you were through. I think I am sufficiently advised on the point now, and will say that for the purpose of this hearing the testimony may be stricken out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

ANDREW AMUNDSEN, a witness produced, sworn and examined on behalf of defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew Amundsen. I live at 1201 Milwaukee avenue. I am in the butter and butterine business. I started
32 five or six years ago in butter, and I could not make any success of that, so I went into butterine, and I increased it, and I doubled it every year, up to July 1st, 1902, when I was selling 2,600 pounds a week, and when the law went into effect, there was

an eruption throughout the whole trade. Every customer I had quit. They didn't want it. When I came around with white butterine, they would try it once, and the next time I came around they met me in the door and said, "We don't want any more of your lard." Then I tried with butter, and of course the majority of my trade now they take one pound of butterine for cooking purposes, while they take two or three pounds of butter for table use. The butterine I sold came from the Wm. J. Moxley factory.

Q. What class of people did you supply with oleomargarine?

A. Well, the laboring class, the majority of them, you might say all of them, the laboring class. They knew it was oleomargarine and not butter, and they bought it because it was cheaper than butter.

Q. What districts of Chicago did you supply?

A. Well, I go as far as Dakota street, and over to Lake and over to Brighton park, and Dakota street over on the West side, Irving park, and Garfield park, and then to Lake avenue,—all around.

Mr. BETHEA: I move to strike out the testimony of the witness as incompetent, irrelevant and immaterial.

The COURT: It may go out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

33 CHARLES F. IZARD, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Charles F. Izard. I am in the restaurant business, located at 163 and 165 West Madison street, Chicago, and have been in the restaurant business for two years last April. I have used oleomargarine in my restaurant almost exclusively, except for cooking, up to July 1, 1902. Since that time we cannot use it. The reason is that people object to the color of it. They do not like the looks of it. It don't seem to give them satisfaction, because it is white. Since July 1st, 1902, we have been using colored butter.

Cross-examination by Mr. BETHEA:

Q. Didn't they object, or didn't they use the butterine where it was colored because they thought it was butter?

A. Why, they had no objection to butterine except when it came white, except it was white. They had no complaint to find with the oleomargarine that had color in it. It was after it came white they were objecting to using it or eating it.

Q. Why didn't you buy the colored oleomargarine when they objected to the white?

A. Well, we had to do that, of course.

Q. That cost ten cents a pound more?

A. Yes, sir.

34 Q. Is that what you buy now?

A. Well, sometimes we buy that and sometimes we buy this here other.

Q. White?

A. No, not the white, colored butter. We cannot use white at all.

Redirect examination by Mr. KEARFUL:

Q. Do you use white oleomargarine for any other purpose than for use on the table?

A. We use it for cooking where we don't use lard.

Q. What proportion of the colored article that you now buy is oleomargarine and what proportion butter?

A. We do not use any oleomargarine now excepting we happen to run out of butter or something of that kind. In the case of an emergency we buy it.

Q. What is the reason you don't buy it now as formerly?

A. Well, it depends upon how much we have, that is, how much the man has on hand that happens to come along that we buy it from, something of that kind. We have objection to this ordinary oleomargarine. We have no objection to the oleomargarine that is colored at all. It gives perfect satisfaction.

Recross-examination by Mr. BETHEA:

Q. Can you get good butter now cheaper than you can get this colored oleomargarine?

A. No, sir.

35 Q. Do you know what the difference is in the price?

A. Well, it varies considerably. It depends upon the quantities you buy and whom you buy it from.

Q. How much, about how much?

A. Oh, it may vary a couple of cents.

Mr. BETHEA: We move to strike out the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial.

The COURT: The motion will be sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

JOHN DADIE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

Myname is John Dadie. I am secretary of the William J. Moxley corporation. That corporation is engaged in the manufacture of oleomargarine or butterine for sale in the various parts of the United States. It manufactured the article involved in this case.

The COURT: Did you use "oleomargarine" and "butterine" interchangeably?

A. We call it oleomargarine legally. In trade it is known as butterine.

Mr. PAGIN: The law defines oleomargarine to be butterine
36 and things called by other names so that the legal term is oleomargarine.

The WITNESS: Oleomargarine or butterine is designed to be used as a substitute for butter, and we color it as butter is colored in order to compete with it. I have been engaged in the business of manufacturing oleomargarine since 1884. The capacity of the Moxley Company factory is in the neighborhood of three to four million pounds per month. It is the largest in the United States. Previous to July 1, 1902, the total output sometimes reached but never exceeded about 2,000,000 pounds per month. The output since July 1st, 1902, has varied from 500,000 to 1,000,000 pounds per month. From my knowledge of the manufacture of this article I know that it cannot be manufactured and sold at a profit in competition with butter if the ten-cent tax is paid. This opinion is based largely upon our experience in manufacturing artificially colored goods upon which we are compelled to pay a tax of ten cents a pound. During the first five months of the present fiscal year, beginning July 1, 1901, we failed to sell any of it at all. During the month of December we did manufacture and sell 37,594 pounds of artificially colored butterine or oleomargarine upon which the ten-cent tax was paid. The article turned out by our factory previous to July 1st, 1902, was all of it artificially colored. The uncolored article which we now put out is sold at the present time in its uncolored
37 state largely to the poorer people, and so far as we are able to ascertain, it is displacing lard and is used for cooking purposes rather than for table use.

Q. Will you state if you know why you have been able to sell some colored oleomargarine upon which you have paid the ten-cent tax during the month of December, although you say that you cannot manufacture this article and sell it at a profit in competition with butter if you pay the tax?

A. For the reason that the price of natural butter during the month of December has been extremely high. The market has reached 29 cents a pound, and under these conditions we have been able to manufacture and sell artificially colored oleomargarine upon which the ten-cent tax was paid, at the price of 24 cents a pound. Now, if the price of butter should drop back to the normal condition of 24 and 25 cents, and I believe that it has within the last few days, we would be practically unable to compete with it in oleomargarine. The average price for butter the year around is approximately in the neighborhood of 25 cents a pound. I am speaking now of the best grades of creamery butter. Dairy butter is considered of a poorer grade, and is sold for considerably less money.

Cross-examination by Mr. PAGIN:

Q. How long prior to July 1st, 1902, were you in the business of manufacturing oleomargarine?

A. Since 1884.

Q. You said that the output of your factory never exceeded 2,000,000 per month before that date?

A. Yes, sir.

38 Before July 1st, 1902, for 12 months before that time, I think the average output would approximate to one and a half million pounds a month. Since that date, July, August, September, 1902, we sold one million and a half pounds for the whole period; and October, November and December we sold two and a half million pounds for that period. Before July 1st, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have been using the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten cent tax. Prior to July 1st, 1902, we had only experimented with it.

Redirect examination by Mr. KEARFUL:

The reason why the uncolored oleomargarine has displaced lard and other substances for cooking purposes is because the price of the two articles is practically the same. At the present time they are selling lard at ten and a quarter cents a pound and butterine at twelve and a half, and the articles being nearly the same price, oleomargarine displaces lard, because it is preferable for cooking purposes. The price of lard at the present time is considered remarkably high. It usually sells from seven to eight cents a pound at this time of the year, and if it should fall to that price the

39 market for uncolored oleomargarine would be greatly reduced.

As to whether we could manufacture and put on the market oleomargarine at seven or eight cents a pound, that would depend altogether on the price of the ingredients that go to make up oleomargarine, but that would be highly improbable.

At the present time the price of oleomargarine, stock or raw material is, like butter and lard, unusually high.

Thereupon the Government, by its counsel, moved to strike out the testimony of the witness; which motion was allowed by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

The defendant then offered in evidence a letter of the acting Commissioner of Internal Revenue, dated November 11th, 1902, to W. D. Guthrie, which reads as follows:

"SIR; The amount of tax collected on oleomargarine at ten cents and one-quarter cent per pound, from July 1st to October 1st, 1902, are as follows: Oleomargarine at ten cents per pound, $9,247.92; oleomargarine at one-quarter cent per pound, $33,718.71. The amount collected at two cents per pound during the same period of 1901, was $491,921.82.

Respectfully, ROBERT WILLIAMS, JR.,
Acting Commissioner."

Mr. BETHEA: We do not object to the form of the evidence, but we object to the facts stated therein as immaterial and irrele-
40 vant.

Which objection was sustained by the court; to which ruling the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

Thereupon the defendant rested.

Thereupon the Government, in rebuttal, introduced the following evidence:

JOSEPH A. PAINTER, recalled on behalf of the Government, testified as follows:

Direct examination by Mr. BETHEA:

Q. Mr. Painter, have you made yourself acquainted with the market here in reference to the kind of butter that has been sold the last two years or is being sold now?

A. I am very well acquainted with it, yes, sir.

Q. What is the fact about there being any butter sold in the natural condition, or offered for sale?

A. Natural condition?

Q. Yes, uncolored.

A. Uncolored?

Q. Yes.

A. Well, there is some uncolored butter in the market which is confined, I believe, entirely, as far as I am aware, to the Jewish settlement; sweet butter, we call it, unsalted.

41 Q. You do not know how much the sale of it is limited?

A. I never found it in any other locality except in the Jewish settlement. I never found it anywhere else in the city.

Q. You do not know but they may sell that at the good hotels and restaurants and cafés here to people that want it?

A. Why, they may.

Q. Have you independently any knowledge as to what kind of butter is used part of the time at the best hotels?

A. I do not know.

Thereupon the Government rested in rebuttal.

The above and foregoing transcript contains all the evidence introduced, or offered to be introduced, on the trial of said cause.

42 Thereupon the defendant moved the court to find in favor of the defendant and to render a verdict and judgment of not guilty and to discharge the defendant, which motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Motion to Find the Defendant Not Guilty.

Comes now the defendant by his counsel and, upon the evidence before the court, moves the court to find in favor of the defendant and render a verdict and judgment of not guilty and that he be discharged, because the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposed a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures or compounds which may be submitted for
43 his inspection in contested cases are to be taxed under this act," and provides "that his decision in matters of taxation under this act shall be final," *it* is in contravention of the Constitution of the United States and of the amendments thereto, and is illegal and void for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law;

Second. The act is an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act invests an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

Fourth. The act so arbitrarily discriminates against oleomargarine in favor of butter in the United States as to be repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
CHARLES C. CARNAHAN,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
Attorneys for Defendant.

Mr. KEARFUL: Upon this motion we should like to be heard.

The COURT: I do not think I want to hear you. I think it is a matter so peculiarly for the Supreme Court that it should go there. I might say that it seems to me to call for the decision of that court upon the constitutionality of the act. I think the matter is well

worthy of consideration. I do not think that this court
44 however should go back of the statute.

Mr. KEARFUL: I will concede to your honor, if you will permit me, that it would be entirely proper in a case of a statute of doubtful constitutionality for the lower court to hold a statute constitutional and let the Supreme Court pass upon it; but I believe that it is the established rule that if the statute is so clearly unconstitutional that it can be demonstrated to the court that it should be held so by the court. And while the rule is different in the case of a doubtful statute, to my mind there is no doubt here and I believe I can show the court the reasons which may induce it to believe as I do, that there is no doubt of the unconstitutionality of the statute.

The COURT: No sir, I think this matter should go to the Supreme Court and be there decided. The statutes are not so doubtful in my mind as to warrant me in holding that they are unconstitutional. I therefore overrule the motion and find the defendant guilty.

To which ruling and finding of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

Thereupon the defendant presented and filed the following motion for a new trial:

45 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.

(2.) The finding is contrary to the law.

(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
CHARLES C. CARNAHAN,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
Attorneys for Defendant.

Which motion was by the court overruled; to which ruling the defendant, by his counsel, then and there duly excepted; which exception was by the court duly allowed.

46 Thereupon, the defendant, by his counsel, presented and filed a motion in arrest of judgment upon the same grounds

as those specified in his foregoing motion to find the defendant not guilty; which grounds the counsel for the respective parties agree may be here considered as inserted herein; which motion in arrest of judgment was by the court overruled; to which ruling, the defendant, by counsel, then and there duly excepted; which exception was by the court duly allowed.

Thereupon, the defendant, being present in open court, the court pronounced its judgment upon the aforesaid finding of guilty and adjudged that the defendant pay a fine of fifty dollars ($50.00) and costs, and that execution issue therefor.

Thereupon, the defendant, by his counsel, gave oral notice in open court of his intention to apply for a writ of error to review said judgment and proceedings in the Supreme Court of the United States, and prayed for a stay of execution to enable him to prepare and file a bill of exceptions.

Thereupon, the court ordered execution of said judgment to be stayed for a period of twenty days and allowed the defendant twenty days within which to prepare and file a bill of exceptions.

47 And now in furtherance of justice and that right may be done, the defendant presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

The foregoing bill of exceptions is true in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court at the December term, 1902, and dated this 27 day of January, 1903.

KOHLSAAT, *Judge.*

Endorsed: 3415. U. S. dist. court, nor. dist. of Ill. The United States *vs.* August Cliff. Bill of exceptions. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

48 And afterwards, to wit, on the 27th day of January, A. D. 1903, there were filed in the clerk's office of said court in the above-entitled cause, a petition for writ of error and assignment of errors; same being in the words and figures following to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

Petition for Writ of Error.

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

And now comes August Cliff, defendant herein, and says that on the 22nd day of January, 1903, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf returnable in the Supreme Court of the United States, for the correction of the errors so complained of, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that an order may be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in
49 this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

50 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division. }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

I.

Error in refusing to hold that the provisions of the act of Congress relating to oleomargarine and butter of August 2, 1886, as amended by the act of Congress of May 9, 1902, under which the defendant was convicted, are in contravention of the Constitution of the United States and the amendments thereto, because:

51 (1.) The said provisions deprive the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2.) The said provisions constitute an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3.) The said provisions invest an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

(4.) The said provisions so arbitrarily discriminate against the oleomargarine industry in favor of the butter industry in the United States as to be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

Error in striking out and refusing to consider proper evidence offered and received on behalf of defendant, showing:

(1.) That the natural color of butter varies at different seasons of the year from almost pure white in the winter season to a

52 high shade of yellow in the spring season, if made from the milk of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter, before it is put on the market;

(2.) That there is no demand in the market for butter having only its natural color except June butter, and that there is no demand in the market for oleomargarine for table use unless the same is colored a shade of yellow which causes it to look like yellow butter;

(3.) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and oleomargarine requires that they shall have a uniform color or a shade of yellow during all seasons of the year;

(4.) That the cost of production of oleomargarine is such that after payment of a tax of ten cents per pound thereon, as required by the act of Congress relating to butter and oleomargarine, of August 2, 1886, as amended by act of Congress of May 9, 1902, the same cannot be sold in competition with butter.

(5.) That the operation and effect of said act of Congress, as amended, relating to butter and oleomargarine are to prevent the

people of the United States from obtaining oleomargarine in
53 the condition in which they want it, and to destroy the oleomargarine industry in the United States and unjustly to discriminate against the same in favor of the butter industry.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: District court of U. S. Northern district of Illinois. Northern division. Petition for writ of error and assignment of errors. United States *vs.* August Cliff. No. 3415. Filed Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk.

54 And afterwards, to wit, on the 27th day of January A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415.

This 27th day of January, A. D. 1903, came the defendant by his attorney, and filed herein his petition for a writ of error and an assignment of errors, to have reversed in the Supreme Court of the United States the judgment heretofore entered herein, and thereupon the court does allow the *the* said writ of error upon the defendant giving bond according to law in the sum of five hundred dollars, which bond shall operate as a supersedeas and stay of execution upon said judgment.

55 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, a bond on writ of error, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the District Court, December Term, A. D. 1903.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415.

Bond in Writ of Error.

Know all men by these presents, that we, August Cliff as principal, and William J. Moxley as surety, are held and firmly bound unto the defendant in error, The United States of America, in the full and

just sum of five hundred dollars ($500) to be paid said defendant in error, The United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seal and dated this 26th day of January in the year of our Lord one thousand nine hundred and three.

56 Whereas, lately at a district court of the United States of America, for the northern district of Illinois, northern division, in a suit pending in said court, between The United States of America, plaintiff, and August Cliff, defendant, a judgment was rendered against the said August Cliff, and the said August Cliff having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing and admonishing it to appear at a session of the Supreme Court of the United States to be holden at the city of Washington in the District of Columbia, on or before the 26th day of February next;

Now the condition of the above obligation is such that if the said August Cliff shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

AUGUST CLIFF. [SEAL.]
WILLIAM J. MOXLEY. [SEAL.]

Sealed and delivered in the presence of:

FRANCIS J. KEARFUL.
JOHN DADIE.

Approved this 27 day of January, A. D. 1903.

KOHLSAAT,
United States District Judge.

Endorsed: No. 3415. District court of the northern district of Illinois, northern division. United States *v.* August Cliff. Bond on writ of error. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

57 And afterwards, to wit, on the 28th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a præcipe for record, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court of the United States, December Term, A. D. 1903.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

Præcipe for Record.

The clerk of said court will make up an authenticated and complete transcript of the record in the above-entitled cause.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: No. 3415. District court of the United States. Northern district of Illinois, northern division. United States of America *vs.* August Cliff. Præcipe for record. Filed Jan. 28, 1903. T. C. MacMillan, clerk.

58 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled The United States *vs.* August Cliff as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago in said district and division, this second day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

59 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a writ of error, same being in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois, northern division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, plaintiff, and August Cliff, defendant, wherein was involved the construction and application of the Constitution of the United States, and wherein the constitutionality of a law of the United States was drawn in question, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at the city of Washington, on the 26th day of
60 February next, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January in the year of our Lord, one thousand nine hundred and three.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois, Northern Division.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a true and complete copy of the record and all proceedings in the foregoing-entitled cause, as witness my hand and official seal this 2nd day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

Copy deposited for the defendant in error in the office of the clerk of district court of the United States for the northern district of Illinois.

[Endorsed:] Writ of error. Filed Jan. 27, 1903 T. C. MacMillan clerk.

61 *Citation.*

Supreme Court of the United States.

UNITED STATES OF AMERICA,
District Court of the Northern District of Illinois, Northern Division, } ss:

To the United States of America and Solomon H. Bethea and Oliver E. Pagin, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 26th day of February next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Illinois, northern division, wherein August Cliff is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

62 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 27th day of January, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh —.

KOHLSAAT,
Judge of the District Court of the United States for the Northern District of Illinois, Northern Division.

Attest: T. C. MACMILLAN, *Clerk.*

Service of the within citation and receipt of a copy thereof admitted this 27th day of January, 1903.

S. H. BETHEA,
U. S. Att'y, Attorney for Defendant in Error.

Filed Jan. 27, A. D. 1903.

T. C. MACMILLAN, *Clerk.*

Endorsed on cover: File No. 18,842. N. Illinois D. C. U. S. Term No. 614. August Cliff, plaintiff in error, *vs.* The United States. Filed February 24th, 1903.

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 10 1903
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF,
Plaintiff in Error,

vs.

THE UNITED STATES.

~~No. 614.~~
~~October Term, 1903.~~

~~No. 231.~~
~~October Term, 1903.~~

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

A BRIEF FOR PLAINTIFF IN ERROR.

JOHN MAYNARD HARLAN,
For Plaintiff in Error.

WILLIAM D. GUTHRIE,
Of Counsel.

WASHINGTON, OCTOBER TERM 1903.

THE GUNTHORP-WARREN PRINTING CO., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in Error,*	No. 614. October Term, 1902.
vs.	
THE UNITED STATES.	No. 221. October Term, 1903.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

A BRIEF FOR PLAINTIFF IN ERROR.

Whether, under the terms of the Act of Congress commonly known as the "Oleomargarine Act," as amended, the use of palm oil, causing oleomargarine "to look like butter of any shade of yellow," renders such oleomargarine subject to a tax of ten cents per pound, or to a tax of only one-fourth of one cent per pound, is a question, the proper answer to which, the writer believes, must lead to a reversal of the Cliff case, even though the constitutional questions involved in the consolidated cases, of which the Cliff case is one, should be decided adversely to the plaintiffs in error.

With the consent of counsel for the plaintiff in error and of the Solicitor General, the writer presents this brief for the plaintiff in error in the Cliff case, because the decision of that case may have important bearing upon another case now pending in the Circuit Court of the United States for the Northern District of Illinois, in which the writer's client is suing to recover a large sum paid under compulsion and protest, as an internal revenue tax, at the rate of ten cents per pound, upon oleomargarine, previously sold tax-paid at one-fourth of a cent per pound,—the oleomargarine there in question having contained palm oil, which caused it "to look like butter" of a "shade of yellow."

It is not proposed here to discuss the constitutional questions involved in the consolidated cases of which this is one, for those questions have been presented and argued already with distinguished ability by counsel representing the plaintiffs in error. It is proposed merely to offer some suggestions, with a view to showing that, even if the Federal oleomargarine law, as it now stands, be held to be constitutional, in all its provisions, yet the oleomargarine purchased and received for sale by the plaintiff in error, Cliff, was subject to a tax only of one-fourth of a cent per pound, which had been duly paid, and therefore the criminal information against Cliff was not well founded.

The information charges that August Cliff sold "ten pounds of a mixture and compound, composed, as the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil (which said last named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow)," and that said oleomargarine "was contained in a new wooden, original manufacturer's package, to which,

as he, the said August Cliff, then and there well knew, no coupon, stamp or stamps, *in the sum of ten cents for each pound* of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting payment of the internal revenue tax on the oleomargarine so contained therein."

The government's evidence showed that the ten-pound package bore a tax-paid stamp of one-fourth of a cent per pound, and that otherwise "the package was marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue"; that "the contents of the package * * * was composed of oleo oil, neutral, lard, cotton-seed oil, milk, common salt and palm oil"; that the palm oil caused said oleomargarine to look like butter of "a shade of yellow," and that the information, charging as a violation of law the purchasing and receiving for sale of the ten-pound package without the payment of a tax of ten cents per pound, was based upon a ruling of the Commissioner of Internal Revenue, contained in his letter addressed to Mr. W. J. Moxley, under date of August 11, 1902, which ruling was as follows:

> "This office rules that where so minute and infinitesimal a quantity [in that instance one-third of one per cent.] of a vegetable oil is used in the manufacture of oleomargarine, as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and therefore that the oleomargarine so colored is not free from artificial coloration, and becomes subject to the tax of ten cents per pound."

The government disavowed any claim that Cliff offered the article for sale as butter.

It thus appears that the government's claim IS NOT that all oleomargarine containing palm oil which causes it "to look like butter of any shade of yellow," is subject to the tax of ten cents per pound; but the claim is only that, such oleomargarine as contains an amount of palm oil, which the Commissioner of Internal Revenue considers "so minute and infinitesimal" as to indicate that it "is used solely for the purpose of producing or imparting a yellow color to the oleomargarine," is subject to the tax of ten cents per pound.

Section 8 of the amended Oleomargarine Act, which is thus interpreted by the Commissioner's ruling, is as follows:

> "Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided, *when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.*"

The Commissioner's ruling, upon which the government relies, apparently makes a distinction between coloration that might be caused by the use of a *large* percentage of palm oil and coloration caused by what he regarded as a *small* or minute percentage of palm oil used in the Moxley oleomargarine. In other words, while the Commissioner and the Solicitor General hold that the coloration of the Moxley oleomargarine was "artificial coloration" and subjected such oleomargarine to a tax of ten cents per pound, yet if the percentage of palm oil used had been, in the opinion of the Commissioner, *large*, the coloration due to its use would not have been regarded by him as "artificial coloration," and the tax would have been only one-fourth of a cent per pound.

Just where the line might be drawn between a *large* percentage and a *small* percentage of palm oil, neither the Commissioner nor the Solicitor General vouchsafes. The honest manufacturer, therefore, guided by the wisest counsel with the law before him, and desiring to manufacture oleomargarine, subject only to the one-fourth of a cent tax, could not foretell, if he used palm oil, which causes a resemblance to butter of a shade of yellow, whether his oleomargarine would be subject to a tax of ten cents, or of one-fourth of a cent, per pound. Moreover, if the present Commissioner ruled that such oleomargarine was subject only to the one-fourth of a cent tax, because the quantity of palm oil used was, in his opinion, *large,* and the resulting coloration therefore not "artificial," his successor in office might regard the quantity of palm oil used as *small,* and the resulting coloration, *therefore,* as "artificial," and might forthwith proceed to make an assessment for unpaid tax to the amount of nine and three-quarter cents per pound—and in such case the manufacturer would have no legal defense against the assessment, if the Commissioner's construction of the law, as set forth in his ruling above quoted, is sound.

The theory of the Commissioner, and of the Solicitor General, seems to be that coloration in oleomargarine is "artificial" when caused even by a statutory and natural ingredient, if used in such *small* quantity as to suggest the inference that it was used for the purpose of imparting color to the finished product, while, if what the Commissioner should regard as a *large* quantity of the same ingredient were substituted for a like volume of any other statutory ingredient hitherto used, as cotton-seed oil, for instance, and the avowed purpose of the substitution were thus to impart coloration to the finished product, the resulting coloration would not be "artificial." That is to say, an intent to color

which is *inferred* by the Commissioner from the use of what he regards as a *small* percentage of palm oil, makes the coloration "artificial," and subjects the oleomargarine to a tax of ten cents per pound; but an *avowed* intent to color by the use of what the Commissioner regards as a *large* percentage of palm oil, in lieu of a like volume of any other statutory ingredient, does not make the coloration "artificial," and subjects the oleomargarine to a tax of only one-fourth of a cent per pound.

Can it be that Congress ever intended that the amount of the tax,—that is, whether ten cents or a quarter of a cent per pound,—to be paid on oleomargarine should depend upon whether the *quantity* used of the material, which causes a resemblance to butter of a shade of yellow, were regarded by the Commissioner of Internal Revenue as a *small* or a *large* percentage of the volume of the finished product? Did not Congress intend that the amount of the tax per pound should depend upon the *nature* of the material, the use of which causes the oleomargarine "to look like butter of any shade of yellow?" Does the word "artificial" as used in the Act refer to an uncertain quantity of a color-giving ingredient to be fixed only in the individual discretion of the Commissioner for the time being, or does "artificial" refer to the *nature* of the material which imparts to oleomargarine a resemblance to "butter of any shade of yellow," so that the manufacturer may proceed in his business with definite certainty as to the amount of tax to be paid upon his finished product?

I.

The second section of the Oleomargarine Act of August 2, 1886, *which is not changed in the amended Act,* defines what shall be known and described as oleomargarine for the purposes of that act; and no mixture or compound is subject to the special tax imposed by that act unless such mixture or compound is fairly and clearly within the definition of oleomargarine as there defined. That section is as follows:

> "All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto and other coloring matter, intestinal fat and offal fat, *made in imitation or semblance of butter, or when so made calculated or intended to be sold as butter or for butter.*"

The Attorney General of the United States rendered an opinion October 18, 1886, to the effect that the last clause of the second section of the Act, being the words italicised above, should be construed as a qualification extending to the whole section, and "is an essential element of the statutory definition of oleomargarine."

Following the opinion of the Attorney General the second section of the Act has been since construed and applied by the Internal Revenue bureau as though it read as follows:

> "That for the purposes of this act certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as oleomargarine *whenever made in imitation or sem-*

blance of butter, or when so made calculated or intended to be sold as butter or for butter, namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto and other coloring matter, intestinal fat and offal fat."

This adapted form of the second section of the Act is quoted from Regulations No. 9, revised June, 1902, issued from the office of the Commissioner of Internal Revenue.

To be oleomargarine within the terms of the Act, whether before or after its amendment, a given compound must therefore have three characteristics: (a) It must be composed of the substances or some of the substances enumerated in Section 2 of the Act. (b) It must be "made in imitation or semblance of butter," that is, it must look like butter so that it might reasonably be mistaken for butter. (c) When "made in imitation or semblance of butter" it must be "calculated or intended to be sold as butter or for butter."

Unless those three characteristics co-exist in a given mixture or compound it is not oleomargarine within the terms of the statute, and is not subject to any tax imposed by the statute. For instance, it could hardly be contended either that "substances known" prior to the act "as * * * lardine, suine or neutral"; or that "mixtures and compounds of * * * lardine, suine or neutral"; or that "lard extracts and tallow extracts"; or that "mixtures and compounds of tallow, beef fat, suet, lard, lard oil," etc., are oleomargarine within the terms of the act, unless such substances, mixtures or compounds look like butter as butter

is generally known. On the other hand, if one of the enumerated substances or compounds were "made in imitation or semblance of butter," but instead of being "calculated or intended to be sold as butter or for butter," were calculated and intended to be sold as a lubricant, then such a substance or compound clearly would not be oleomargarine within the terms of the Act.

See opinion of Attorney General Garland, dated October 18, 1886. Opinions of Attorney General, Vol. 18, page 489; also see

Opinion of Commissioner Yerkes, dated January 12, 1903, published as No. 615, Vol. 6, Treasury Decisions, citing with approval Attorney General Garland's opinion and also the opinion of Judge Grosscup in *Braun & Fitts* v. *Coyne* (known as the "Fruit of the Meadow" case), rendered January, 1899, and just published for the first time in 125 Fed. Rep., advance sheets No. 4.

II.

Whether or not a given product, possessing the three statutory characteristics of oleomargarine, as defined in Section 2 of the Act, is subject to a tax of ten cents per pound, or to a tax of one-fourth of a cent per pound, depends not upon whether in fact it looks "like butter of any shade of yellow," but upon the *cause* of such resemblance if it exists. If there is such resemblance to "butter of any shade of yellow," and that resemblance is not due to "artificial coloration," the tax will be one-fourth of a cent per pound; if the resemblance is due to "artificial coloration" the tax will be ten cents per pound.

The classification made by the Solicitor General, of "colored" and "uncolored" oleomargarine, as the basis of ascertaining the rate of tax—that is, whether ten cents or a fourth of a cent per pound—is not the classification made by the 8th section of the amended Act and is not recognized or justified by any provision in the amended Act. Indeed, it is doubtful whether any "uncolored" mixture can come within the statutory definition of oleomargarine, or whether, under the Act, *any tax whatever* can fall upon what is loosely described as "uncolored oleomargarine;" for, as is pointed out above, a mixture or compound of any of the statutory ingredients is not oleomargarine, within the meaning of the Act, *except* when such mixture or compound is "made in imitation or semblance of butter" and is "calculated or intended to be sold as butter or for butter." As was said by Judge Grosscup in the "Fruit of the Meadow" case, above cited, "the tax practically is upon the product of such manufactures of leaf lard, beef fat, etc., as are made in the conscious imitation of butter. * * * The test is this: Is the product a conscious imitation of butter?" Now, has anyone ever seen an "uncolored" mixture,—a mixture without color,—which was a conscious imitation of butter or which was likely to be sold as or for butter? Unless, therefore, a mixture or compound *without color* could have such resemblance to butter and such likelihood of being sold as butter or for butter, it seems to be misleading, in discussing this case, to speak of "uncolored oleomargarine." But, whether or not there can be, under the Act, any such thing as "uncolored oleomargarine," it is certainly misleading to describe by the term "uncolored oleomargarine," the oleomargarine upon which the tax of one-fourth of a cent per pound is imposed by the Act.

What the statute provides shall be taxed at one-fourth of a cent per pound is not "*uncolored* oleomargarine," but

oleomargarine which, though it may look like butter of a shade of yellow, is yet free from "artificial coloration." Hence the purpose and effort of every manufacturer will naturally be to secure the desired resemblance to butter without the use of "artificial coloration." It is vital, therefore, alike to the manufacturer and to the government, to determine what is meant by the term "artificial coloration" as used in the statute.

III.

When is "coloration" in oleomargarine "artificial" within the meaning of the Act?

The Century Dictionary defines the word "artificial" as meaning "made or contrived by art or by human skill and labor; opposed to natural; as artificial heat or light; artificial magnet."

In this broad sense butter, produced as it is by the application of human labor to a natural product, cow's milk, is itself an artificial substance, though it have no ingredient foreign to the milk from which it is made. Such butter is nevertheless called *natural* butter, and its color is said to be *natural* because it is not due to any substance foreign to cow's milk. But if such butter have added to it coloring matter—that is, something not belonging to *natural* butter—the resulting coloration is artificial. "Artificial coloration," therefore, means the opposite of natural coloration.

By parity of reasoning, when one is speaking of oleomargarine, *natural* coloration means a coloration due to a *natural* ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the *nature* of oleomar-

garine. If the color-giving ingredient be a *natural,* that is, a *statutory* ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is "artificial coloration" merely because the *quantity* of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color? Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a *statutory,* or, so to speak, a *natural* ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as, for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when, by reason of his arbitrary classification, based upon the *quantity* of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a substantial part of the finished product, it is conceded that the tax would be only one-fourth of a cent per pound.

The Solicitor General lays stress upon the claim (not supported by the evidence unless the *ex parte* statement in the commissioner's letter [Cliff record, p. 9] be regarded as evidence) that the use of a large proportion of palm oil would render the oleomargarine deleterious to health and unfit for use. He seems to have overlooked the positive and unchallenged testimony of Prof. de la Fontaine to the contrary. (Cliff record, p. 12.) But even if that assumption

of the Solicitor General were correct how could it affect the rate of tax? For, since palm oil is a vegetable oil and is, therefore, a *statutory* or *natural* ingredient of oleomargarine, can resemblance to "butter of a shade of yellow" caused by the use of palm oil in a quantity conceded to be perfectly harmless be regarded as "artificial coloration" merely because under that assumption the use of a large proportion of palm oil would have rendered the oleomargarine subject, not to be taxed, but to be "forfeited to the United States." ("Oleomargarine Act," Sec. 15.)

On page 18 of Regulations No. 9, revised June, 1902, appears the regulation as to "artificial coloration," as follows:

> "If in the production of oleomargarine, mixtures or compounds set out in the law of 1886 are used, and these compounds are all free from *artificial coloration*, and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of one cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been *artificially* colored is used as a component part of the finished product oleomargarine, (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration, a tax of ten cents per pound will be assessed and collected. But if butter, absolutely free from *artificial* coloration, or cottonseed oil free from *artificial* coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product, oleomargarine, has *naturally* a shade of yellow in no way procured by artificial coloration, and through the use of one or more of these unartificially-colored legal component parts of oleomargarine, the finished product should look like butter of any shade of yellow, then the product will be subject to a tax of only one-fourth of one cent per

pound, as it is absolutely free from *artificial* coloration, that has caused it to look like butter of any shade of yellow." (Italics are the Commissioner's.)

So far as concerns the oleomargarine purchased and received for sale by plaintiff in error, Cliff, this "regulation as to artificial coloration" is based upon the same construction of the eighth section of the amended Act as that which is now contended for on his behalf; for it is conceded that vegetable oils are "legally used in the manufacture of the finished product oleomargarine" and are "legal component parts of oleomargarine"; that palm oil is a vegetable oil; and that palm oil "has *naturally* a shade of yellow in no way procured by artificial coloration." With what reason, then, can it be held that this "shade of yellow," which palm oil "*naturally*" has, becomes "artificial coloration" when imparted by the palm oil to oleomargarine?

The only answer which the Commissioner gave and the Solicitor General now gives to this question is that the *quantity* of palm oil used is "*so minute and infinitesimal*" as to show that it was "used solely *for the purpose* of producing or imparting a yellow color to the oleomargarine." But if it be the fact that such was the sole purpose of the manufacturer in using a small quantity of palm oil, where, pray, in the statute is warrant found for taxing that *purpose*. Is coloration "artificial" when it results from purpose or design and "unartificial" only when it occurs *without* purpose or design, or is accidental, as it were?

The position of the government is clearly in conflict with the decisions.

In *Merritt* v. *Welsh*, 104 U. S., 694, it was held that the treasury department had no discretion but to classify the quality of sugar according to its color, although the color

test had become entirely inadequate, and although the color of the lower class was imparted in manufacture to the higher class *for the very purpose of evading the higher tax.* Speaking by Justice Bradley, the court said (p. 701):

> "The color standard has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.
>
> "Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand—that of the polariscope, or other chemical test. If the quantity of saccahrine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.'"

And again (p. 704):

> "If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws, which they imagine Congress would have made

had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, providing he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger* v. *Farwell,* 139 U. S., 608, it was expressly held that the introduction of a few cotton threads into woolen cloth for the very purpose of having it classed as part wool goods, and thus to evade a higher duty laid on woolen goods, would prevent the collector from classifying the goods as woolen.

The Supreme Court, by Blatchford, J., referred to the proceedings below in the Circuit Court for the Northern District of Illinois and approved the reasoning of the opinion of that court, saying (p. 610):

"The court, in its opinion, said that the Collector, in classifying the goods, evidently assumed that the

purpose of mixing the cotton with the wool was to secure a low classification, and assumed that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

We concur in this view, and the judgment is affirmed."

This decision was followed in *Magone* v. *Luckemeyer,* 139 U. S., 612.

In *United States* v. *Schoverling,* 146 U. S., 76, 81, it was held, following the *Merritt* case, that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States* v. *Irwin,* 78 Fed. Rep., 799, the Circuit

Court of Appeals for the Second Circuit, speaking by Circuit Judge Wallace, said (p. 801):

> "Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced separately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.
>
> It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws."

And again, after referring to some of the decisions of this court (p. 802):

> "Applying these principles to the present case, we cannot escape the conclusion that if the articles in controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments merely for the purpose of escaping the duty upon shotguns."

The principle and language of the opinion in *Morrill* v. *Jones,* 106 U. S., 466, is also directly in point. The court, speaking by Chief Justice Waite, there said (p. 467):

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case,

we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

IV.

Doubt, if there be any, in this case, should be resolved in favor of the plaintiff in error.

In *United States* v. *Wigglesworth*, 2 Story, 369, Mr. Justice Story, in giving reasons for holding that the Revenue Act of 1841 did not intend to levy a permanent tax on indigo, said:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *In every case, therefore, of doubt,* such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed or presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense remedial laws, or laws founded upon any public policy, and therefore are not to be liberally construed. Hence

in the present case, if it be a matter of real doubt whether the intention of the Act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period when it would otherwise be free."

In *Hartranft* v. *Wiegmann,* 121 U. S., 609, the court said that:

"If the question were one of doubt, the doubt would be resolved in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations," citing:

Powers v. *Barney,* 5 Blatchf., 202.
U. S. v. *Isham,* 84 U. S. (17 Wall.), 496, 504.
Gurr v. *Scudds,* 11 Exch., 190, 191.
Adams v. *Bancroft,* 3 Sumn., 384.

In *United States* v. *Isham,* 17 Wall., 496, the court said:

"If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr* v. *Scudds,* 11 Exch., 191, 'a tax cannot be imposed without clear and express words for that purpose,'" citing *Conroy* v. *Warren,* 3 Johns. Cas., 259;

As the practical question involved in the pending issue is really a question of classification, a case specially in point is that of the *American Net & Twine Company* v. *Worthington, Collr.,* 141 U. S., 468.

That was a suit to recover excess duties paid under protest on gilling twine (subject to 25% duty), which had been classified by the customs officials as linen thread (subject to 40% duty) and assessed at the higher rate. In sustaining the claim of the importer, the Supreme Court said:

"We think the intention of Congress that these goods should be classified as 'gilling twine' is plain; but were

the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language," citing:

U. S. v. *Isham,* 17 Wall., 496.

Hartranft v. *Wiegmann,* 121 U. S., 609.

Gurr v. *Scudds,* 11 Exch., 190.

See, also,

Eidman v. *Martinez,* 184 U. S., 578, 583.

Rice v. *U. S.,* 53 Fed. Rep., 910, 911.

Matheson & Co. v. *U. S.,* 71 Fed. Rep., 394, 395.

In re Southern Pacific Co., 82 Fed. Rep., 311, 313; 87 Fed. Rep., 863.

Schoenemann v. *U. S.,* 119 Fed. Rep., 584, 587.

Dean v. *Charleton,* 27 Wis., 522, 526.

V.

If, by the eighth section of the amended Act, Congress intended what this brief contends for as being the proper construction of that section, it would seem to be impossible that Congress intended, by the fourteenth section of the amended Act, to confer upon the Commissioner of Internal Revenue, power to defeat the intention expressed in the eighth section. If, by the eighth section, Congress imposed a tax of only one-fourth of a cent per pound upon such oleomargarine as that which was purchased and received for sale by the plaintiff in error, it would seem to be a legal solecism to say that, under the fourteenth section, the Commissioner of Internal Revenue may impose a tax of ten cents per pound upon such oleomargarine.

All the cases cited in the Government's brief, in discussing the fourteenth section, go to the point that Congress may confer upon an executive officer the power to ascertain and determine facts and to *apply the law* to the facts when ascertained. But such a power is quite different from the power to determine *finally* what is the law—which latter is the power in effect claimed for the Commissioner of Internal Revenue by the Government in this case. Here the facts are entirely undisputed, and the question presented is purely a question of law, namely, whether resemblance to "butter of any shade of yellow," caused by the admixture of palm oil in the manufacture of oleomargarine, is "artificial coloration" within the meaning of the amended Act.

In *U. S.* v. *200 Barrels of Whiskey,* 95 U. S., 571, 576, holding that a particular construction of the internal revenue law by the Commissioner of Internal Revenue was unwarranted, the court, by Chief Justice Waite, said:

> "The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

The invalidity of the disputed clause in the fourteenth section of the amended Act, if that clause means what the Government contends that it means, seems to be established by the decision in *U. S.* v. *Eaton,* 144 U. S., 678, 687-8, where the court, speaking by Justice Blatchford, said:

> "It was said by this court in *Morrill* v. *Jones,* 106 U. S., 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes

from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States."

* * * * *

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under § 18 of the act."

VI.

It is not proposed to argue here the question raised on the hearing as to the validity of a waiver of a jury in this case, in view of the provisions in the Constitution of the United States guaranteeing a trial by jury. But the writer ventures in that connection to refer to the cases of *Callan* v. *Wilson,* 127 U. S., 540, and *Thompson* v. *Utah,* 170 U. S., 343, 353-4, in the former of which a jury trial had been demanded, and in the latter of which the State claimed that a jury of twelve had been waived by the accused by his failing to object to trial by a jury of eight until after verdict.

In *Callan* v. *Wilson,* Callan had been convicted of conspiracy before the police court of the District of Columbia and was sentenced to pay a fine of $25.00, and upon default in its payment to suffer imprisonment in jail for a period of thirty days. Callan not having paid the fine

and having been imprisoned, a writ of *habeas corpus* was sued out on the ground that he was restrained of his liberty in violation of the Constitution, as the statute did not make provision for a jury trial in the police court. This court said:

> "The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime' in its more extended sense comprehends every violation of law; in a limited sense it embraces offenses of a serious or atrocious character. In our opinion the provision is to be interpreted in the light of the principles which at common law determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be considered as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanor, the punishment of which *involves or may involve the deprivation of the liberty of the citizen.*"

The reasoning of the court in *Thompson* v. *Utah*, also seems to proceed upon the idea that the right of trial by jury, as it existed at common law, could not be denied or waived *where the accused might be deprived of his life or liberty.*

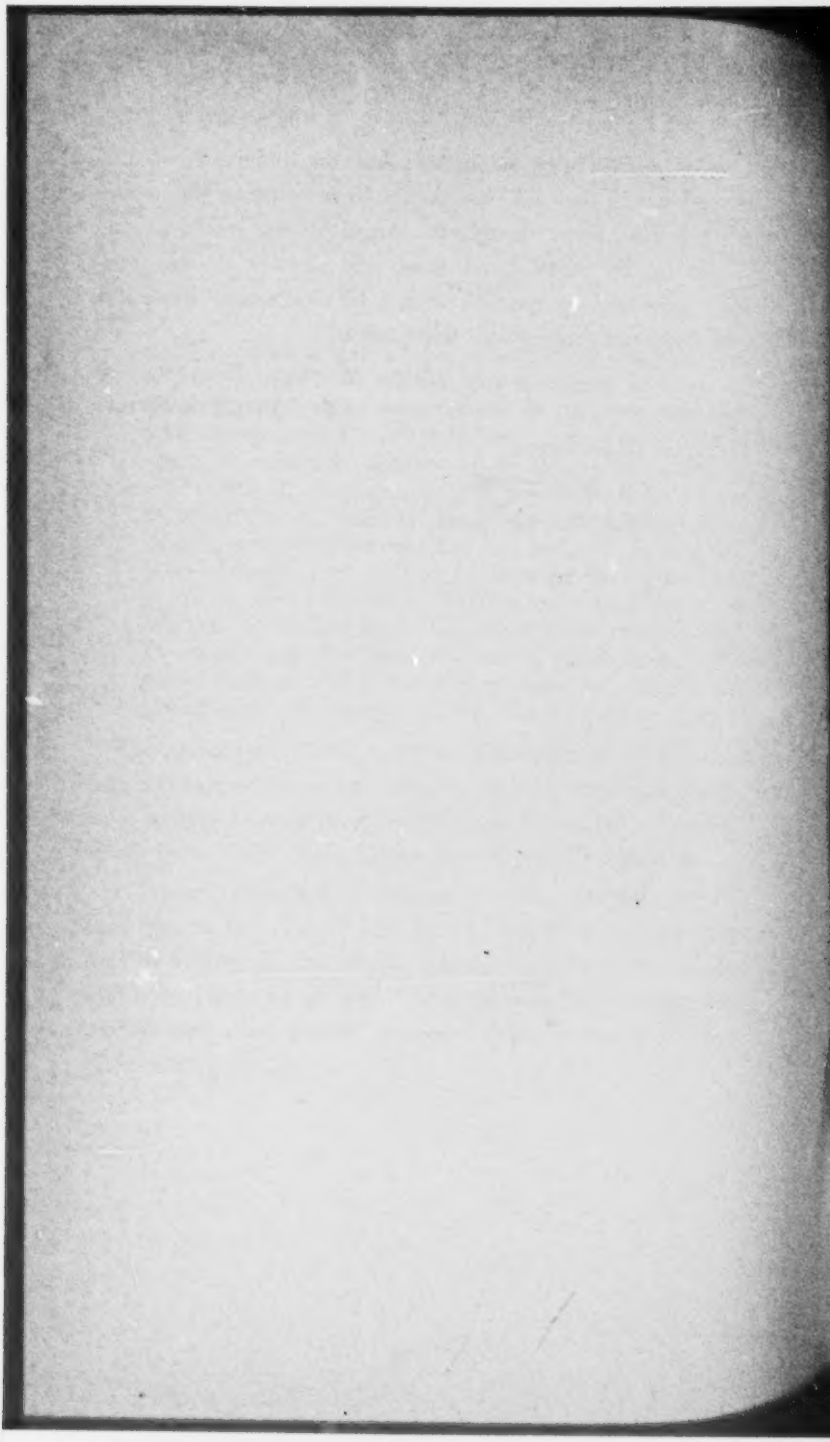
It seems, therefore, pertinent to call attention to the fact that in the case at bar, in which a trial by jury was expressly waived, the offense charged was punishable by fine only (Sec. 11 of the "Oleomargarine Act") and that the district court neither did nor could impose a penalty of imprisonment.

It is respectfully submitted that the judgment of the lower court in the Cliff case should be reversed on the merits of that case, even though the constitutional questions involved in the consolidated cases, and already so ably and fully discussed by counsel, should be determined adversely to the plaintiffs in error in those cases.

JOHN MAYNARD HARLAN,
For Plaintiff in Error.

WILLIAM D. GUTHRIE,
Of Counsel.

Washington, October Term, 1903.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 19.

AUGUST CLIFF, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING AND MOTION TO RECALL MANDATE.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

WASHINGTON, OCTOBER TERM, 1904.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15332

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PETITION FOR REHEARING AND MOTION TO RECALL MANDATE.

Now comes the said plaintiff in error, by his attorney and counsel, and moves that the mandate of this honorable court in said cause be recalled, and respectfully petitions this honorable court for a rehearing of said cause, and in support of his petition begs leave to present the reasons following.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

This case was heard simultaneously with three others, in which the grave constitutional questions involved were of such absorbing interest and importance as to exclude a full presentation on the oral argument of the merits of this case arising upon the *interpretation* of the oleomargarine law which the court has since upheld as being in accord with the Constitution.

Therefore, inasmuch as the decision of the question arising in this case under the oleomargarine law may be regarded as controlling a case in which the writer's client is concerned, involving a large amount of money and now pending in the circuit court of the United States for the northern district of Illinois, it is respectfully urged that the allowance of opportunity for an oral argument in this case, to be confined exclusively to the question arising under the oleomargarine law itself, and without attempting to reopen discussion of the constitutionality of that law, might subserve the ends of justice without prejudice to the interests of the Government and at the cost only of a slight trespass upon the time of the court.

Considerable time having elapsed since this case was decided, it seems well here to restate the case.

STATEMENT.

The pertinent provisions of the oleomargarine law (as amended in 1902) are as follows:

Section 2 reads:

> "That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine,

and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

In section 8 is the following provision:

> "That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound.*"

Section 11 reads:

> "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

By section 14 the Commissioner of Internal Revenue—

> "is authorized to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Plaintiff in error was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law—that is to

say, ten pounds of a mixture and compound composed, as he, the said August Cliff, well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley" * * * and that said oleomargarine "was contained in a new wooden original manufacturer's package to which, as he, the said August Cliff, then and there well knew, no coupon stamp or stamps, in the sum of ten cents for each pound of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein."

The Government's evidence showed that the ten-pound package bore tax-paid stamps at the rate of one-fourth of a cent per pound, and that otherwise "the package was marked, stamped, and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue;" that "the contents of the package was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil;" that the palm oil caused said oleomargarine to look like butter of "a shade of yellow," and that the information charging as a violation of law the purchasing and receiving for sale of the ten-pound package without the payment of a tax of ten cents per pound was based (Pr. Rec., p. 8) upon a ruling of the Commissioner of Internal Revenue, contained in his letter addressed to Mr. W. J. Moxley, under date of August 11, 1902, which ruling was as follows:

> "This office rules that where so minute and infinitesimal a quantity [in that instance one-third of one per cent.] of a vegetable oil is used in the manufacture of oleomargarine, as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and therefore that the oleomargarine so colored is not free from artificial coloration, and becomes subject to the tax of ten cents per pound" (Pr. Rec., p. 10).

The Governmment affirmatively disavowed any claim that Cliff had offered the article for sale as butter (Pr. Rec., p. 10).

For the convenience of the court its opinion, affirming the judgment of the lower court, sentencing the defendant under section 11 above quoted, is printed as an appendix to this petition.

REASONS FOR A REHEARING.

The court's opinion, if the writer correctly apprehends it, might be stated in the form of a syllogism, thus:

The first premise would be, to use the court's language:

> "When any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to look like butter of any shade of yellow, it is an artificial coloration."

Second premise: The palm oil used in the oleomargarine purchased and received for sale by the plaintiff in error "substantially served only the function of coloring the mass" to look like butter of a shade of yellow.

Conclusion: Therefore said oleomargarine was not free from artificial coloration and was subject to a tax of ten cents per pound, and the plaintiff in error, having knowingly purchased and received for sale said oleomargarine stamped only at the rate of one-fourth of a cent per pound, violated the statute and was lawfully found guilty of the offense charged and sentenced to pay a fine.

To establish the first premise in this syllogism, the court says:

> "It is true that under the last clause of section 2 oleomargarine includes 'all mixtures and compounds' of the substances named, 'made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter,' and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, 'and other coloring matter.' The purpose in so including 'coloring matter' is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this it is rightfully styled an artificial coloration. Otherwise the proviso practically nullifies the body of the section. For 'other coloring matter' includes all coloring matter, at least all of the nature of those named; and hence the addition of any coloring matter would produce only a natural and not an artificial coloration, and thus relieve the product from the ten-cent tax. It will be noted that the regular tax imposed upon oleomargarine by section 8 is ten cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it

> clear that his oleomargarine is within its scope. That exception is 'when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow.' Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration" (195 U. S., 163).

The writer begs leave to say that the fallacy of this argument and of the proposition or first premise stated above, which it is intended to establish, lies—

(1.) In a misconception of the term "other coloring matter," leading as a consequence to a misinterpretation of the term "artificial coloration."

(2.) In a misapplication of the rule that a party who claims the benefit of an exception must make it clear that he comes within the exception. That rule does not apply to this case.

(3.) In the erroneous assumption that there is a causal relation between the *amount* of the revenue tax paid on oleomargarine and the accomplishment of the purpose of the act "to prevent the sale of oleomargarine *as and for butter*."

I.

As to "Annotto and Other Coloring Matter."

The theory of the court's opinion in this case seems to be that any substance which imparts color is within the term "other coloring matter" as used in the statute, and if it serves substantially only the purpose of coloring the product

so as to cause it to look like butter of a shade of yellow, then such color-giving substance is artificial coloration.

The clause in the court's opinion, "For 'other coloring matter' includes all coloring matter, at least of the nature of those named," indicates that the court regarded as "coloring matter" all, or at least more than one, of the substances named in the section. But the fact is that *annotto* is the only "coloring matter" specifically named in the section; for with the exception of *annotto* all the substances named specifically in section 2 of the act are fats or oils. Properly speaking, a fat or an oil is not and cannot be called a "coloring matter," even if such fat or oil, as used in the oleomargarine, "substantially serves only the function of coloring the mass and so as to cause the product to look like butter of any shade of yellow." It is not the *motive* with which a particular substance is used in a specific case nor the quantity used, but it is rather *the inherent nature of the substance itself* that determines its classification. If inherently the substance is a fat or an oil, then it does not become a "coloring matter" merely because only a small quantity of it is used and even though the motive in using it is to make the oleomargarine "look like butter of any shade of yellow."

An oil is generically different from a coloring matter. Coloring matter is a pigment or dye, and never an oil. A natural oil, like palm oil, has its pigment, which gives to the oil the color which is native to and characteristic of that oil. The oil has its pigment or coloring matter dissolved in it by nature, but the oil itself is not coloring matter. The color may fade away, but the oil remains; or if the coloring principle native to any oil could be extracted the substance thus procured might be called "coloring matter," but the oil would still remain. In short, the fats and oils, including vegetable oil, mentioned in the statutory definition of oleomargarine are, properly speaking (and as described by

this court in *McCray v. United States*, 195 U. S., 27), "authorized ingredients not artificially colored," but each one having its own color due to the presence in it of a natural pigment. It follows, therefore, that resemblance to butter of a "shade of yellow" due to the use in the oleomargarine of palm oil which, being vegetable oil, is one of these "authorized ingredients not artificially colored" does not make the palm oil an "artificial coloration" merely because the quantity of palm oil used is small and the purpose of its use is to impart to the oleomargarine the color native to that oil. On the other hand "annotto and other coloring matter" are neither fats nor oils, and, properly speaking, are not "authorized ingredients," but are authorized "coloring matter" which imparts artificial coloration to the oleomargarine in which it is used and subjects such oleomargarine to a Government tax of ten cents per pound; and the words "other coloring matter" include all substances "of the nature of" *annotto*, which is the only "coloring matter" specifically named in the statute.

If the words "other coloring matter" had been omitted, then when some "coloring matter" or dye other than *annotto*—as, for instance, the "Wells-Richardson Improved Butter Color"—was used it might have been claimed that the product was not oleomargarine within the meaning of the statute; and it was to prevent any such claim that the words "other coloring matter" were added, thus embracing all coloring matters of the nature of *annotto*, the *one* "coloring matter" specifically mentioned.

With this distinction between "authorized ingredients" and authorized "coloring matter" kept clearly in mind, it is apparent that the proviso in section 8 does not nullify the preceding part of that section. For oleomargarine in which *annotto* or "other coloring matter" is used will be subject to the tax of ten cents per pound because *annotto* or "other coloring matter" of the nature of *annotto* is "artificial coloration." On the other hand, oleomargarine composed

exclusively of "authorized ingredients not artificially colored" will be subject only to the tax of one-fourth of a cent per pound, even though such oleomargarine "look like butter of any shade of yellow" and regardless of the quantity used of that particular "authorized ingredient not artificially colored" that may be used to impart the color.

This distinction between "authorized ingredients" and authorized "coloring matter" seems to have been clearly contemplated by the court in the *McCray* case, for it entirely accords with the reasoning of the court in its opinion in that case where the court said:

> "Nor is there force in the contention that the plain meaning of the statute is overcome by an amendment to which it was subjected. Before the amendment relied on, the proviso read as follows: '*Provided*, When oleomargarine is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.' By the amendment the word 'ingredient' was stricken out, thus leaving the proviso in the form in which it was enacted. The proposition is that the elimination of the word 'ingredient' compels to the conclusion that wherever artificial coloration in the finished product of oleomargarine was produced by artificial coloration used in an authorized ingredient, that such coloration was not artificial within the statute. But this disregards the fact that butter, both when artificially colored and when not so colored, was made an authorized ingredient of oleomargarine. If then the word 'ingredient' had not been stricken out, it might have given rise to the contention that the imparting of a yellow color to the finished product of oleomargarine by the use in its manufacture of spring butter of a natural yellow color would have caused the product oleomargarine to be artificially colored within the statute. As the manufacturer of oleomargarine was permitted to use either butter not artificially colored or butter so colored, the effect of striking out the word 'ingredient' operated simply to render it *certain* that

> the finished product, *even although of a yellow color*, would be within the proviso where the color was imparted *by an authorized ingredient not artificially colored*. This overthrows the contention that the finished product, when not free from artificial coloration, must be treated as free from such coloration, because the color was derived from an artificially colored though authorized ingredient."

It is, then, to use the court's language in the *McCray* case, "certain that the finished product, even although of a yellow color, would be within the proviso [that is, taxable only at one-fourth of a cent per pound] where the color was imparted by an authorized ingredient not artificially colored."

The ingredients of the oleomargarine "purchased and received for sale" by Cliff are known and undisputed, and the brief and explicit statement by this court in the *McCray* case, above quoted, makes it a simple matter to determine whether a product of these known ingredients, looking "like butter of any shade of yellow," is subject to the tax of ten cents or to the tax of one-fourth of a cent per pound.

Was the color "imparted by an authorized ingredient not artificially colored"? If so, then the oleomargarine is "free from artificial coloration" and the tax is one-fourth of a cent per pound. Otherwise the tax is ten cents per pound.

In this case it is conceded that the resemblance to butter of a shade of yellow was due to the use of a small amount of palm oil in the oleomargarine. It is likewise conceded that the *natural* color of palm oil is orange-yellow. In other words, the color in palm oil belongs to the fat and has no existence separate and apart from the fat.

The only question in this case, therefore, is this: Is palm oil an "*authorized ingredient*" of oleomargarine? An affirmative answer to this question is found in the fact that palm oil is a vegetable oil, and that by the very terms of the second section of the oleomargarine act vegetable oil is specified as one of the ingredients of oleomargarine as defined

for the purposes of that act, and, as has been shown, vegetable oil and "coloring matter" are generically different and mutually exclusive.

The meaning of the term "artificial coloration," as used in the act, apparently seemed at one time just as simple and clear to the Internal Revenue Bureau as it did to this court in the *McCray* case and as it has always seemed to the writer. No more clear exposition of that phrase could be desired than that which was officially published by the Commissioner of Internal Revenue in Regulations No. 9, Revised June, 1902, shortly after the passage of the amendatory act (May 9, 1902), and was in force at the time plaintiff in error purchased and received for sale the ten-pound package of oleomargarine, and, as the writer understands, is still in force. On page 18 of those "Regulations" appears the regulation as to artificial coloration, as follows:

REGULATION AS TO ARTIFICIAL COLORATION.

> "If in the production of oleomargarine the mixtures or compounds set out in the law of 1886 are used, and these compounds are all free from *artificial coloration*, and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of one cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been *artificially* colored is used as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration the tax of ten cents per pound will be assessed and collected. But if butter absolutely free from *artificial* coloration, or cotton-seed oil free from *artificial* coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product oleomargarine has *naturally* a shade of yellow in no way procured by artificial coloration, and through the use of one or more of

> these unartificially-colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one-fourth of one cent per pound, as it is absolutely free from *artificial* coloration that has caused it to look like butter of any shade of yellow." (Italics are the Commissioner's.)

This "regulation as to artificial coloration" construes the term "artificial coloration" precisely as this court construed it in the McCray case and precisely also as the writer contends it should be construed in this case; for it is admitted that vegetable oils are "legally used in the manufacture of the finished product oleomargarine" and are "legal component parts of oleomargarine;" that palm oil is a vegetable oil, and that palm oil "has *naturally* a shade of yellow in no way procured by artificial coloration."

With what reason, then, can it be held that this "shade of yellow," which palm oil "naturally" has, becomes "artificial coloration" when imparted by the palm oil to oleomargarine? The reason given by the Commissioner of Internal Revenue in support of this change of view was that the quantity of palm oil used is "so minute and infinitesimal" that "it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and therefore that the oleomargarine so colored is not free from artificial coloration."

The court's opinion in this case seems to sanction the Commissioner's later view, and, as the writer respectfully submits, departs from the interpretation placed by the court in the *McCray* case upon the same statutory provisions.

The opinion of the court in this case apparently makes a distinction between coloration that might be caused by the use of what might be regarded as a *large* percentage of palm oil and coloration caused by what might be regarded

as a *small* or *minute* percentage of palm oil. In other words, while the court has held that the coloration of the Moxley oleomargarine purchased by Cliff was "artificial coloration" and subjected such oleomargarine to a tax of ten cents per pound, yet if the percentage of palm oil used had been *large* in the opinion of the Commissioner or of a jury or of the lower court (a jury being waived) the coloration due to its use would not have been held by the court to be "artificial coloration," and the tax would have been only one-fourth of a cent per pound.

Just where the line might be drawn between a *large* percentage and a *small* percentage of palm oil neither the Commissioner nor the court has stated. The honest manufacturer, therefore, guided by the wisest counsel having the court's opinion before him, and desiring to manufacture oleomargarine subject only to the one-fourth of a cent tax, could not foretell, if he used palm oil, whether his oleomargarine would be subject to a tax of ten cents or of one-fourth of a cent per pound. Moreover, if the present Commissioner were to rule that oleomargarine hereafter made containing, say, 5 per cent. of palm oil, was subject only to the one-fourth of a cent tax because that quantity of palm oil was in his opinion *large* and the resulting coloration therefore not "artificial," his successor in office might regard that quantity of palm oil as *small* and might forthwith proceed to make an asse-sment for unpaid tax to the amount of nine and three-fourths cents per pound, and in such case the manufacturer would have no legal defense against the assessment, if the construction of the law stated in the Commissioner's ruling August 11, 1902, above quoted, is sound.

The court's opinion seems to hold that coloration in oleomargerine is "artificial" when caused even by a *statutory*—that is, a *natural*—ingredient, if used in such *small* quantity as to suggest the inference that it was used substantially only for the purpose of imparting color to the finished product, while if what the court

should regard as a *large* quantity of the same ingredient were substituted for a like volume of any other statutory ingredient hitherto used (as, for instance, cotton-seed oil) and the avowed purpose of the substitution were thus to impart coloration to the finished product, the resulting coloration would not be "artificial"—that is to say, an intent to color which is inferred from the use of what may be regarded as a *small* percentage of palm oil makes the coloration "artificial" and subjects the oleomargarine to a tax of ten cents per pound, but an avowed intent to color by the use of what might be regarded as a *large* percentage of palm oil in lieu of a like volume of any other statutory ingredient does not make the coloration "artificial," and subjects the oleomargarine to a tax of only one-fourth of a cent per pound, because the palm oil would in that case form a substantial part of the body of the product.

Right here it may be in point to note that palm oil is a wholesome food product and might be used in oleomargarine in larger proportion without prejudice to the healthfulness of the oleomargarine. (Pr. Rec., 12.)

Can it be that Congress ever intended that the amount of the tax—that is, whether ten cents or one-fourth of a cent per pound—to be paid on oleomargarine should depend upon whether the quantity used of the material which causes a resemblance to butter of a shade of yellow were regarded by the Commissioner of Internal Revenue or by a jury or a court as a *small* or a *large* percentage of the volume of the finished product? If Congress had so intended, would it not have specified the percentage that must be used of any color-giving ingredient in order that the manufacturer should not lose the benefit of the lower tax if he desired to make oleomargarine that would be subject only to the lower tax, and in order that he might not unwittingly expose himself to punishment for violation of the law? Did not Congress intend that the amount of the tax per pound should depend

upon the *nature* of the material the use of which causes the oleomargarine "to look like butter of any shade of yellow"? Does the word "artificial" as used in the act refer to an uncertain quantity of a color-giving ingredient to be fixed only in the individual discretion of the Commissioner for the time being or by the verdict of a jury or the finding of a court?

Is it not more reasonable to hold that the word "artificial" refers rather to the *nature* of the material which imparts to oleomargarine a resemblance to butter of a shade of yellow, so that the manufacturer may proceed in his business *with definite certainty as to the amount of tax to be paid upon his finished product?*

In *Merritt v. Welsh*, 104 U. S., 694, it was held that the Treasury Department had no discretion but to classify the quality of sugar according to its color, although the color test had become entirely inadequate and although the color of the lower class was imparted in manufacture to the higher class *for the very purpose of evading the higher tax.* Speaking by Mr. Justice Bradley, the court said (p. 701):

> "The color standard has come to be a precarious one. Still, if the Government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.
>
> "Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the Government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand,—that of

the polariscope, or other chemical test. *If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends tyranny begins.'*"

And again (p. 704):

"If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are

manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger v. Farwell*, 139 U. S., 608, it was expressly held that the introduction of a few cotton threads into woolen cloth for the very purpose of having it classed as part wool goods, and thus to evade a higher duty laid on woolen goods, would prevent the collector from classifying the goods as woolen.

The Supreme Court, by Blatchford, J., referred to the proceedings below in the circuit court for the northern district of Illinois and approved the reasoning of the opinion of that court, saying (p. 610):

> "The court, in its opinion, said that the collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, and assumed that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiffs for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool *without naming how much of other material should enter into their composition in order to secure such lower rate of duty*, the court was of opinion that manufacturers and importers *had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate;* that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do

so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

"We concur in this view, and the judgment is affirmed."

This decision was followed in Magone *v.* Luckemeyer, 139 U. S., 612.

In *United States v. Schoverling*, 146 U. S., 76, 81, it was held, following the *Merritt* case, that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States v. Irwin*, 78 Fed. Rep., 799, the circuit court of appeals for the second circuit, speaking by Circuit Judge Wallace, said (p. 801):

> "Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced separately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.
>
> "*It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws.*"

And again, after referring to some of the decisions of this court (p. 802):

> "Applying these principles to the present case, we cannot escape the conclusion that if the articles in

> controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments *merely for the purpose of escaping the duty upon shotguns.*"

II.

THE RULE THAT ONE WHO CLAIMS THE BENEFIT OF AN EXCEPTION MUST MAKE IT CLEAR THAT HE COMES WITHIN ITS SCOPE HAS NO APPLICATION TO THIS CASE.

DOUBT, IF ANY, IN THIS CASE SHOULD BE RESOLVED IN FAVOR OF THE PLAINTIFF IN ERROR. THE OLEOMARGARINE LAW IS A REVENUE LAW, AND SHOULD BE LIBERALLY INTERPRETED IN FAVOR OF THE TAX-PAYER.

FURTHERMORE, THIS IS A CRIMINAL CASE, AND FOR THAT REASON ALSO DOUBT SHOULD BE RESOLVED IN FAVOR OF THE PLAINTIFF IN ERROR. NOT ONLY MUST THE GOVERNMENT SHOW BY THE WEIGHT OF EVIDENCE THAT THE DEFENDANT HAS DONE THE THING CHARGED, BUT IT MUST MAKE IT CLEAR BEYOND A REASONABLE DOUBT THAT THE THING CHARGED AND DONE WAS A VIOLATION OF THE LAW.

The proviso of the eighth section of the oleomargarine law as amended is really AN INDEPENDENT ENACTMENT.

In *Georgia R. R. & Banking Co. v. Smith*, 128 U. S., 174, in discussing the construction of a proviso in the charter of the Georgia Railroad and Banking Company, this court, speaking by Mr. Justice Field, said:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it,

> or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

See also *United States v. Babbitt*, 1 Black, 55; *Savings Bank v. Collector*, 3 Wall., 495.

Section 8 of the original oleomargarine law, passed August 2, 1886, was as follows:

> "SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

Now, when Congress came to amend this section by the act of May 9, 1902, all that was done was to change the word "two" to "ten" and to add after the first sentence in the section these words:

> "*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound."

Is this not a perfect example of the "common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided'"? Is not the office of the word "provided" that of "simply serving to separate or distinguish the different paragraphs or sentences," thus classifying oleomargarine for the purpose of Federal taxation into two classes—(*a*) oleomargarine not free from artificial coloration, upon which ten cents per pound must be paid, and (*b*) oleomargarine free from artificial coloration, upon which only one-fourth of a cent per pound is to be paid?

But even if the proviso in section 8 as amended were to be regarded as an "exception" to the preceding part of section 8, nevertheless it should be construed liberally in favor of the manufacturer and tax-payer.

In *Eidman v. Martinez*, 184 U. S., 578, a case requiring the construction of the New York inheritance tax law, this court, speaking by Mr. Justice Brown, said:

> "It is an old and familiar rule of the English courts applicable to all forms of taxation, and *particularly special taxes*, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception *confining the operation of the duty*, (*Warrington v. Furbor*, 8 East, 242, 247; *Williams v. Sangar*, 10 East, 66, 69; *Denn v. Diamond*, 4 B. & C., 243, 245; *Tomkins v. Ashby*, Y. B. & C., 541; *Doe v. Snaith* 8 Bing., 146, 152; *Wroughton v. Turtle*, 11 Mees. & W., 561, 567; *Gurr v. Scudds*, 11 Exch., 190), though the rule regarding exemptions from general laws imposing taxes may be different (*Cooley on Taxation*, 145; *In matter of Enston*, 113 N. Y., 174, 177)."

> [Note that the oleomargarine law is not a "general law imposing taxes," but a law imposing "special taxes."]

> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally in-

terpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language, (*Hartranft v. Wiegmann*, 121 U. S., 609; *American Net & Twine Co. v. Worthington*, 141 U. S., 468; *United States v. Wigglesworth*, 2 Story, 369; *Powers v. Barney*, 5 Blatchford, 202)."

In *Warrington v. Furbor*, 8 East, 242, 245, Lord Ellenborough, Ch. J., says:

> "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception *confining the operation of the duty*."

DOUBT, IF ANY, IN THIS CASE SHOULD BE RESOLVED IN FAVOR OF THE PLAINTIFF IN ERROR. THE OLEOMARGARINE LAW IS A REVENUE LAW, AND SHOULD BE LIBERALLY INTERPRETED IN FAVOR OF THE TAX-PAYER.

In *United States v. Wigglesworth*, 2 Story, 369, Mr. Justice Story, in giving reasons for holding that the revenue act of 1841 did not intend to levy a permanent tax on indigo, said:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *In every case, therefore, of doubt* such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed or presumed to be imposed, beyond what the statutes expressly and clearly import. *Revenue statutes are in no just sense remedial laws*, or laws founded upon any public policy, *and therefore are not to be liberally construed.*

> Hence in the present case, if it be a matter of rea. doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt would absolve the importer from paying the duty beyond the period when it would otherwise be free."

Hartranft v. Wiegmann, 121 U. S., 609, 616, was an action to recover duties alleged to have been illegally exacted. The question in dispute was the classification of certain shells, the plaintiff contending that they were exempt from duty by provision of the free list, while the Government asserted that they were subject to a duty of 25 per cent. *ad valorem*. It was held that the shells were exempt from duty. The court, speaking by Mr. Justice Blatchford, said :

> "We are of the opinion that the decision of the circuit court was correct. But if the question were one of doubt, the doubt would be resolved in favor of the importer 'as duties are never imposed on the citizen upon vague or doubtful interpretation.' (*Powers v. Barney*, 5 Blatch., 202; *United States v. Isham*, 17 Wall., 496, 504; *Gurr v. Scudds*, 11 Exch., 190, 191; *Adams v. Bancroft*, 3 Sumn., 384.)"

In *United States v. Isham*, 17 Wall., 496, the court said :

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr v. Scudds*, 11 Exch., 191, 'a tax cannot be imposed without clear and express words for that purpose,'" citing *Conroy v. Warren*, 3 Johns. Cas., 259.

As the practical question involved in the pending issue is really a question of classification, a case specially in point is that of *The American Net & Twine Co. v. Worthington, coll'r*, 141 U. S., 468. That was a suit to recover excess duties paid under protest on gilling twine (subject to 25 per cent. duty) which had been classified by the customs officials as linen thread (subject to 40 per cent. duty) and assessed at

the higher rate. In sustaining the claim of the importer the Supreme Court said:

> "We think the intention of Congress that these goods should be classified as 'gilling twine' is plain; but were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language."

Citing—
United States v. Isham, 17 Wall., 496.
Hartranft v. Wiegmann, 121 U. S., 609.
Gurr v. Scudds, 11 Exch., 190.

In *Bensinger v. United States*, 192 U. S., 38, 55, certain figures representing various saints and two figures of adoring angels had been specially imported into the port of New York in good faith for the use and by order of certain religious societies. The importers claimed the figures were entitled to free entry under paragraph 649 of the tariff act of 1897. The appraiser had returned them as "church statues composed of plaster of Paris decorated," or as "articles and wares composed wholly or in chief value of earthy or mineral substances not specially provided for," and the collector had assessed upon them a duty of 45 and 35 per cent. *ad valorem* under paragraphs 97 and 450 of the same act.

In deciding that these figures were entitled to free entry under paragraph 649 the court, speaking by Mr. Justice Peckham, at page 55, uses this language:

> "This provision of the statute [provision for free entry] should be liberally construed in favor of the importer, and if there were any fair doubt as to a true construction of the provision in question, the court should resolve the doubt in his favor. (*American Net & Twine Co. v. Worthington*, 141 U. S., 468; *United States v. Wigglesworth*, 2 Story, 369; *Rice v. United States*, 53 Fed. Rep., 910.)"

In *Powers v. Barney*, 5 Blatch., 202, Mr. Justice Nelson said:

> "In cases of serious ambiguity in the language of the act or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on a citizen upon vague or doubtful interpretation."

In *Adams v. Bancroft*, 3 Sumn., 384, Mr. Justice Story said:

> "Laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretation, for every duty imposes a burden on the public at large, and is construed strictly and must be made out in a clear and determinate manner from the language of the statute."

Rice v. United States, 53 Fed. Rep., 910, cited with approval by this court, *supra*, is thus stated in the head-note:

> "Revenue statutes, including those fixing duties on imports are neither remedial laws nor laws founded upon any permanent public policy and should be construed most strongly against the Government, for burdens should not be imposed on the taxpayer beyond what such statutes expressly and clearly import."

In re Southern Pacific Co., 82 Fed. Rep., 311, was an application for a review of the decision of the board of United States general appraisers relative to the classification for duty of two importations of creosote merchandise. The appellant asserted that the liquid creosote was a product of coal tar and entitled to free entry, while the appellee declared it was a distilled oil and subject to a duty of 25 per cent. *ad valorem*. The court, Morrow, circuit judge, in holding that the liquid creosote was not a distilled oil, but was a product of coal tar, said:

> "Even if I were in doubt as to which of these paragraphs [of the tariff act] applied, such doubt

under the rule of construction relating to tariff acts, would have to be resolved in favor of the importer."

In *Hempstead & Son v. Thomas*, 122 Fed. Rep., 538, 59 C. C. A., 342, the matter in dispute was the classification of tungsten ore. The court, speaking by Buffington, district judge, said:

> "The question here involved is whether this ore should be classified under section 614 (free list) of the tariff of 1897 (act July 24, 1897, c. 11, 30 Stat., 199 [U. S. Comp. Stat. 1901, p. 1685]), which embraced 'minerals, crude or not advanced in value or condition by refining or grinding, or by other process not specifically provided for in this act,' or under section 183, which covers 'metallic mineral substances in a crude state and metals unwrought, not specially provided for in this act, twenty per cent. *ad valorem*.' In determining that question the canon of construction is that *tax laws, being in derogation of common right, must be construed strictly.* (*Hartranft v. Wiegmann*, 121 U. S., 615; 7 Sup. Ct., 1240; 30 L. Ed., 1012.) The burden of showing the ore is covered by section 183 is upon the Government, and, if its classification is open to a construction which would as well place it on the free list, the course most favorable to the importer must be adopted (*American Co. v. Worthington*, 141 U. S., 468; 12 Sup. Ct., 55; 35 L. Ed., 821), 'as duties are never imposed on the citizen upon vague or doubtful interpretation' (*Hartranft v. Wiegmann, supra*)."

To the same effect are the English cases.

In *Williams v. Sangar*, 10 East, 66, 69 (case of turnpike tolls), Lord Ellenborough says:

> "In the construction of these tax acts we must look at the strict words, however we may sometimes lament the generality of the expression used in them; but we must construe those words according to their plain meaning with reference to the subject-matter."

In *Denn v. Diamond*, 4 B. & C. (case of an *ad valorem* duty on sales), Bayley, J., says:

> "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language."

In *Tompkins v. Ashby*, 6 B. & C., 541, 543 (case of a stamp duty), Lord Tenterden, Ch. J., says:

> "Acts of Parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature."

In *Doe v. Snaith*, 8 Bing., 147, 152 (case of a stamp duty), Tindal, Ch. J., says:

> "As all stamp acts, being a burden on the subject, must be clearly expressed, wherever they impose the burden, I should say that even if there were doubt, *we should take the smaller sum.*"

In *Wroughton v. Turtle*, 11 Mees & W., 561, 567, Park, B., says:

> "It is a well-settled rule of law that every charge on the subject must be imposed by clear and unambiguous words."

In *Marquis of Chandos v. Com. of Inland Revenue*, 6 Exch., 464, 479, Pollock, C. B., says:

> "It is a well-established rule in the construction of revenue acts that a duty cannot be imposed on the subject except by clear words. The meaning of the legislature must be distinctly made out *from the terms of the statutes.*"

In *Gurr v. Scudds*, 11 Exch., 190, 192, Pollock, C. B., says:

> "If there is any doubt as to the meaning of a stamp act, it ought to be construed *in favor of the subject*, because a tax cannot be imposed without clear and express words for that purpose."

In *Partington v. Attorney Gen.*, L. R., 4 H. L., 100, 122, Lord Cairns says:

> "As I understand the principle of all fiscal legislation, it is this: 'If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, *cannot bring the subject within the letter of the law, the subject is free*, however apparently within the spirit of the law the case might otherwise appear to be.' In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

Dwarris, at page 742, says:

> "Statutes made for the advancement of trade and commerce and to regulate the conduct of merchants ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of that sort, the legislature would be laying a snare for the subject, *and a construction which conveys such an imputation ought never to be adopted.* Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any. * * * In like manner in the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject; 'for this plain reason,' said Heath, J., in *Hubbard v. Johnson*, 3 Taunt., 77, 'that the legislature is ever at hand to explain its own meaning and to express more clearly what has been obscurely expressed.'"

* * * * * * *

> "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any am-

> biguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown."

FURTHERMORE, THIS IS A CRIMINAL CASE, AND FOR THAT REASON, ALSO, DOUBT SHOULD BE RESOLVED IN FAVOR OF THE DEFENDANT. NOT ONLY MUST THE GOVERNMENT SHOW BY THE WEIGHT OF EVIDENCE THAT THE DEFENDANT HAS DONE THE THING CHARGED, BUT IT MUST MAKE IT CLEAR BEYOND A REASONABLE DOUBT THAT THE THING CHARGED AND DONE WAS A VIOLATION OF THE LAW.

In *United States v. Wiltberger*, 5 Wheat., 76, in deciding that the courts of the United States have no jurisdiction of the crime of manslaughter committed by a master upon a seaman on board a vessel of the United States lying in a small river in China 35 miles from its mouth by virtue of the act of April 30, 1790, giving jurisdiction for the punishment of certain crimes against the United States and providing for the punishment of manslaughter committed on the high seas, Marshall, C. J., said:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new or independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim

is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated."

This last case was cited in *U. S. v. Harris*, 177 U. S., 305, 310, where it was held that a receiver of a railroad is not within the letter or the spirit of the provision of the act of March 3, 1873, c. 252, 17 Stat., 584, entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States," and which provided that no railroad company within the United States conveying live stock from one State to another should confine the same in cars for a longer period than forty-eight consecutive hours without resting and feeding.

In *Sarlls v. U. S.*, 152 U. S., 570, it was decided in this case that lager beer is not a "spirituous liquor" within the meaning of that term as used in the act prohibiting the introduction and sale of "ardent spirits," "spirituous liquors and wine," into the Indian country.

United States v. Watts, 1 Bond, 580; Fed. Cas. 16653, was an action of debt by the United States to recover a tax or

duty claimed to be due under a law of 1862 levying a tax on legacies. In construing the law, Leavitt, district judge, said:

> "The statute in question abounds in penalties for its violation. The defendant in this action is subject to a penalty for refusing payment of the duty or tax claimed on these legacies, if such duty or tax is legally chargeable. In accordance with the well-settled rules of construction, statutes of this character cannot be so construed as to extend their meaning beyond the clear import of the words used. It is the duty of the courts of the Union undoubtedly, so far as they are vested with any agency in carrying out the financial purposes of the Government, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law. It belongs exclusively to the legislative department of the Government to define and declare upon what subjects taxes shall be imposed, and to provide the agencies by which they shall be assessed and collected. And however expedient it may seem, under certain circumstances, to invade the proper domain of the legislature by judicial construction, it is clearly in conflict with the theory of the Government."

In *United States v. Distilled Spirits*, 10 Blatch., 428, 433, in construing a forfeiture clause of the internal-revenue act of July 20, 1868, Woodruff, circuit judge, said:

> "I concur with those who hold that the forfeiture applies only to cases for which no specific penalty or punishment is imposed by other sections. The 96th section clearly admits of that interpretation. *The fact that intelligent and fair minds have been in doubt, and have differed on the subject*, and an examination of the section itself, both concur to show, that, at most, the construction claimed by the Government, though it be possible, *is doubtful*. In construing a severe statute declaring a heavy forfeiture (and according to one construction claimed,

for small offenses), it is just to say that those who are called upon to conduct their business affairs in view of all its provisions ought to be fairly apprised of its requirements and its penalties, of whatever kind. They are bound to know the law, but law-makers owe to them the duty to make the law intelligible; and those whose business it is to construe a law which is of doubtful or double meaning *should not incline to the harshest possible meaning when it is obvious that those to whom it is to be applied may well have been led to trust in another, which is less severe, but equally satisfying its terms.*"

Judge Cooley, in quoting the above, says that these remarks "apply with great force to nearly all the Federal revenue laws."

Cooley on Taxation, 2d ed., 269.

May it not be said with reason and force that the manufacturer, after reading the eighth section of the amended act and after reading the official interpretation of the *proviso* of that section as contained in the department "REGULATION AS TO ARTIFICIAL COLORATION," was justified in thinking that the oleomargarine here in question was subject only to the tax of one-fourth of a cent per pound? And may it not reasonably be said that the plaintiff in error had no reason to suppose that he was violating the law in purchasing and receiving for sale the ten-pound package properly branded and marked and stamped tax-paid at the rate of one-fourth of a cent per pound? If so, then should the court "incline to the harshest possible meaning when it is obvious that those to whom it is to be applied may well have been led to trust in another, which is less severe, but equally satisfying its [the law's] terms"?

III.

THE AMOUNT OF THE REVENUE TAX PAID ON OLEOMARGARINE BEARS NO CAUSAL RELATION TO THE ACCOMPLISHMENT OF THE PURPOSE OF THE ACT, "TO PREVENT THE SALE OF OLEOMARGARINE AS AND FOR BUTTER."

In its opinion, the court says:

> "Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine *as and for butter*, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration."

By the language of the first clause of this sentence the writer understands the court to mean that one of the purposes of the act was to prevent deception by surrounding the sale of oleomargarine with such safeguards that no one could buy oleomargarine under the impression that he was getting butter. If this interpretation of the court's language is correct, then it is respectfully submitted that the conclusion of the court stated in the above sentence is clearly a *non sequitur*. For under the law the package of oleomargarine free from artificial coloration, and therefore stamped tax-paid at the rate only of one-fourth of a cent per pound, is required to be marked, stamped, and branded in the same manner as a package of oleomargarine taxed at the rate of ten cents per pound, with the single exception of the difference of figures on the stamps. The marking, stamping, and branding, as required by the law, will be no less effective to prevent deception on account of the smaller denomination of the stamps used. The stamps of the smaller denomination will be just as conspicuous as those of the larger denomination, and the

marking and branding just as plain and effective in the one case as in the other.

In this case the Government affirmatively disavowed any claim that Cliff had offered the article for sale as butter (Pr. Rec., p. 10).

If, on the other hand, as the writer does not believe, the language, "Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter," meant that the purpose was to prevent deception *by preventing altogether the sale* of oleomargarine of such quality and color as to be useful for family consumption, then it would seem to be clear upon principle and authority that, in so far as the purpose of Congress was to *prohibit* the sale of oleomargarine, that purpose should not be accepted by this court as its guide for the interpretation of the act.

In passing upon the constitutionality of the oleomargarine law of 1886, in *In re Kollock*, 165 U. S., 526, this court, speaking by Chief Justice Fuller, said:

> "The act before us is, on its face, an act for levying taxes, and although it may operate, in so doing, to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."
>
> This was quoted with approval in *McCray v. United States, supra.*

Viewing and construing the act as an act for the raising of revenue, the numerous cases already cited show that where there is doubt the act should be interpreted favorably to the manufacturer and tax-payer, *limiting the amount of the tax to the smaller rate unless it is clear that the higher rate applies to his product;* and the fact that the court deemed it necessary in this case to take into account the incidental purpose of the act to prevent deception in the sale of oleomargarine seems to indicate somewhat definitely that in the court's mind *there was a doubt in this case* as to whether the lower

or the higher rate of tax applied to the oleomargarine purchased and received for sale by the plaintiff in error. In thus citing the purpose of the act, to prevent deception, as a reason for resolving doubt against the manufacturer and taxpayer, the court in effect treated the act, not as an act for raising revenue, but as a remedial act. Since, however, the branding, marking, and stamping of the package with stamps of the lower denomination will be as effective to prevent deception as if the package were stamped with stamps of the higher denomination, it seems apparent that the accomplishment of this purpose of the act—to prevent deception—is not at all incompatible with the application of the rule that in construing revenue laws doubt should be resolved in favor of the tax-payer.

Moreover, if the act be regarded from the view-point of its remedial purpose, the imposition of the ten-cent tax in a case of doubt might fairly be considered as *in the nature of a penalty*, since the tax of one-fourth of a cent per pound, with the branding, marking, and stamping in accordance with law, would as surely accomplish the purpose of preventing deception; and the imposition of a penalty by construction, as it were, ought not to be favored, especially where the act, as in this case, provides specific penalties for its violation.

Again, viewing the act in its remedial aspect, a construction that would impose the ten-cent tax in case of doubt, where the remedial purpose would be as well effected by the smaller tax, would substantially impute to Congress the intention, under the guise of a tax levied to raise revenue, to inflict a destructive penalty upon the manufacture of an article the commercial character of which is thoroughly established and the wholesomeness of which is abundantly attested by the enormous growth in its use in every civilized country during the last twenty-five years. (*Schollenberger v. Pennsylvania*, 171 U. S., 1, 8–12.) Such, it is respectfully submitted, should not be presumed to have been the intention of

Congress, and if there is any reasonable interpretation of the act which would avoid imputing such an intention to Congress that interpretation, it seems to the writer, should be adopted.

IV.

If, by the eighth section of the amended act, Congress intended what this petition contends for as being the proper construction of that section, it would seem to be impossible that Congrss intended, by the fourteenth section of the amended act, to confer upon the Commissioner of Internal Revenue power to defeat the intention expressed in the eighth section. If, by the eighth section, Congress imposed a tax of only one-fourth of a cent per pound upon such oleomargarine as that which was purchased and received for sale by the plaintiff in error, it would seem to be a legal solecism to say that, under the fourteenth section, the Commissioner of Internal Revenue may impose a tax of ten cents per pound upon such oleomargarine.

All the cases cited in the Government's brief, in discussing the fourteenth section, go to the point that Congress may confer upon an executive officer the power to ascertain and determine facts and to *apply the law* to the facts when ascertained. But such a power is quite different from the power to determine *finally* what is the law—which latter is the power in effect claimed for the Commissioner of Internal Revenue by the Government in this case. Here the facts are entirely undisputed, and the question presented is purely a question of law, namely, whether resemblance to "butter of any shade of yellow," caused by the admixture of palm oil—a vegetable oil—in the manufacture of oleomargarine, is "artificial coloration" within the meaning of the amended act.

In *U. S. v. 200 Barrels of Whiskey*, 95 U. S., 571, 576, holding that a particular construction of the internal-revenue

law by the Commissioner of Internal Revenue was unwarranted, the court, by Chief Justice Waite, said:

> "The regulations of the Department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

The invalidity of the disputed clause in the fourteenth section of the amended act, if that clause means what the Government contends that it means, seems to be established by the decision in *U. S. v. Eaton*, 144 U. S., 678, 687–8, where the court, speaking by Justice Blatchford, said:

> "It was said by this court in *Morrill v. Jones*, 106 U. S., 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into affect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States."
>
> * * * * * *
>
> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under § 18 of the act."

In view of these considerations and authorities, it is earnestly urged that a rehearing be granted and opportunity be given for an oral argument in this case, to be confined to the question arising under the oleomargarine law itself and without attempting to reopen discussion as to the constitutionality of that law.

Respectfully submitted.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, the undersigned, attorney and counsel for said August Cliff, plaintiff in error, do hereby certify that in my opinion there is just ground in point of law for the allowance of a rehearing in said cause.

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

AUGUST CLIFF, *Plaintiff in Error*,
v.
THE UNITED STATES. } No. 19.

In Error to the District Court of the United States for the Northern District of Illinois.

[October 24, 1904.]

Mr. Justice BREWER delivered the opinion of the court:

August Cliff was convicted in the district court of the United States for the northern district of Illinois of a violation of section 11 of the act of August 2, 1886, (24 Stat., 209), amended May 9, 1902, (32 Stat., 193). A judgment for fifty dollars, as prescribed by the section, was entered with an order for collection by execution. That judgment was brought directly to this court by writ of error. The constitutionality of the oleomargarine legislation and the right to waive a trial by jury in petty criminal offenses were affirmed in *McCray v. United States*, 195 U. S. 27, and *Schick v. United States*, *id.*, 65. Nothing need be added to the opinions in those cases on these questions.

There is in this case a further question. Section 2 reads:

> "SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neu-

tral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

In section 8 is this provision:

"SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound."

By section 14 the Commissioner of Internal Revenue

"is authorized to decide what substances, extracts, mixtures or compounds, which may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Defendant was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law—that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley."

It was shown that the tax of ten cents per pound had not been paid, that the package contained ten pounds, that its

ingredients and their proportions were: Three pounds of oleo oil; one pound and twelve ounces of neutral lard; two pounds of cotton-seed oil; one pound and fourteen and a half ounces of milk; one pound and four ounces of salt; one and one-half ounces of palm oil. In other words, out of one hundred and sixty ounces, only one and one-half ounces were palm oil. There was introduced in evidence a ruling of the Commissioner of Internal Revenue as follows:

> "This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of ten cents per pound."

Now the contention is that Congress having by section 2 named the possible ingredients of oleomargarine, the coloring given to a compound of some or all by the use of one of the named ingredients is a natural coloring, and not an artificial coloration subjecting to a tax of ten cents per pound. In order that the precise contention may be understood we quote the following from one of the briefs filed for plaintiff in error:

> "By parity of reasoning, when one is speaking of oleomargarine, natural coloration means a coloration due to a natural ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the nature of oleomargarine. If the color-giving ingredient be a natural, that is, a statutory ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is 'artificial coloration' merely because the quantity of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color?

> Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a statutory, or, so to speak, a natural ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when, by reason of his arbitrary classification, based upon the quantity of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a substantial part of the finished product, it is conceded that the tax would be only one-fourth of a cent per pound?"

We do not undervalue the force of this argument, but, as applied to this case, hold that it cannot prevail. It is true that under the last clause of section 2 oleomargarine includes "all mixtures and compounds" of the substances named, "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, "and other coloring matter." The purpose in so including "coloring matter" is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does

substantially only this it is rightfully styled an artificial coloration Otherwise the proviso practically nullifies the body of the section. For "other coloring matter" includes all coloring matter, at least all of the nature of those named; and hence the addition of any coloring matter would produce only a natural and not an artificial coloration, and thus relieve the product from the ten cent tax. It will be noted that the regular tax imposed upon oleomargarine by section 8 is ten cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it clear that his oleomargarine is within its scope. That exception is "when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow." Bearing in mind also that one of the purposes of this legislation was to prevent the sale of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to "look like butter of any shade of yellow," it is an artificial coloration.

Whether the Commissioner of Internal Revenue has all the authority which is in terms committed to him by section 14 need not be determined. The letter containing his ruling was admitted in evidence without objection. Irrespective of such ruling, and upon the other testimony, the judge who tried the case, and whose decision must be considered as equivalent to the verdict of a jury, could rightfully have found that this package of oleomargarine was artificially colored by the small amount of palm oil used in its manufacture. A witness testified that he called at the place of business of the defendant, "and found this ten-pound package of oleomargarine, which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax paid stamp of one-quarter of a cent a pound." Other witnesses testified to the exact per cent. of palm oil used in the preparation of the package. One said that "the article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the 'Daisy grade,' the lower grade. It is a substitute for butter." Another testified that "a very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such

that it may be used to make oleomargarine or white substances to look like butter." Further, the defendant offered quite an amount of testimony, which was received by the court and afterwards on motion stricken out as irrelevant and immaterial. Included in this was that of the secretary of the manufacturer, who testified that "before July 1, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have used the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten cent tax."

The verdict of a jury is conclusive upon a question of fact unless plainly against the evidence. The same weight, as we have said, must be given to the finding of a court, and upon the testimony received without objection a finding that this palm oil served substantially only to color the product cannot be disturbed. Indeed the fact was made certain by the testimony offered by the defendant, although that testimony was afterwards stricken out by the court as immaterial.

We see no error in the record, and the judgment is *affirmed*.

The CHIEF JUSTICE, Mr. Justice HARLAN, and Mr. Justice PECKHAM dissented.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

AUGUST CLIFF, *Plaintiff in Error,*
vs.
THE UNITED STATES.

No. 19.

REPLY TO SOLICITOR-GENERAL'S "SUGGESTION RESPECTING PETITION FOR REHEARING."

JOHN MAYNARD HARLAN,
Attorney and Counsel for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH STREET, CHICAGO, ILL.

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SUGGESTION RESPECTING PETITION FOR REHEARING.

The Solicitor-General respectfully brings to the attention of the court the fact that the fine of $50 imposed in this case, with the costs, $19.15, were duly paid by the plaintiff in error, Cliff, to the clerk of the court in which the conviction was had, on February 28, 1905, and that such fine and costs have been duly covered into the Treasury of the United States, as shown by the following letter from the Acting Commissioner of Internal Revenue:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, May 11, 1905.

The SOLICITOR-GENERAL,
Department of Justice,
Washington, D. C.

SIR: Referring to the case of the *United States* v. *August Cliff*, being an indictment in the United States District Court for the Northern District of Illinois for violation of section 11 of

the act of August 2, 1886, as amended by section 3, act of May 9, 1902, I have the honor to state, in response to a verbal inquiry made by Special Assistant Attorney Lott of your office, that the records of this office show that the sum of fifty dollars ($50.00) fine imposed in this case, and the further sum of nineteen dollars and fifteen cents ($19.15), costs, making a total of sixty-nine dollars and fifteen cents, were paid over to Henry L. Hertz, esq., collector First District of Illinois, by T. C. McMillan, esq., clerk of the United States District Court, Northern Judicial District of Illinois, on February 28, 1905, and that the said amount of sixty-nine dollars and fifteen cents ($69.15) has been covered into the Treasury of the United States, as shown by the report made to this office on form 58 by Collector Hertz, for the month of February, 1905.

Respectfully,

ROBT. WILLIAMS, Jr.,
Acting Commissioner.

The Solicitor-General submits that by reason of the payment of the fine and costs the case has been finally settled, and only a moot question is presented by the petition. As said by this court in *Kimball* v. *Kimball* (174 U. S., 158, 161), Mr. Justice Gray delivering the opinion:

> The court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue in the case before it.

To the same effect is the case of *Tyler* v. *Judges, etc.*, 179 U. S., 405, 409; *Hatfield* v. *King*, 184 U. S., 162, 165.

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

O

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

AUGUST CLIFF, *Plaintiff in Error,*
vs.
THE UNITED STATES. } No. 19.

REPLY TO SOLICITOR-GENERAL'S "SUGGESTION RESPECTING PETITION FOR REHEARING."

Not knowing how far the court's denial of the petition for rehearing in this case was predicated upon the printed suggestion filed by the Solicitor-General, the writer ventures to present a brief reply and to ask that it have such consideration as the court may deem fit.

It is quite true, as stated by the Solicitor-General (quoting from the court's opinion in *California* v. *San Pablo & Tulare Railroad*, 149 U. S., 308, 314, cited with approval in *Kimball* v. *Kimball*, 174 U. S., 158, 161) that

> "The court is not empowered to decide moot questions, or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

But the writer respectfully submits that the Solicitor-General is mistaken in thinking that by reason of the payment of the judgment for penalty and costs, this case has been *finally* settled and that "only a moot question is presented by the petition."

What has occurred since this court handed down its decision of this case early this term appears from the following certificate:

> "IN THE DISTRICT COURT OF THE UNITED STATES,
> For the Northern District of Illinois.
>
> I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, DO HEREBY CERTIFY that a mandate issued out of the Supreme Court of the United States on February 11, A. D. 1905, in the case of August Cliff, plaintiff in error, *vs.* The United States, defendant in error, was filed in the

District Court of the United States for the Northern District of Illinois by leave of Court on the 23rd day of February, A. D. 1905, and *thereafter* on the 28th day of February, A. D. 1905, said August Cliff, defendant in said case in said District Court of the United States, paid the judgment therein against him for the penalty of Fifty dollars and for costs amounting to nineteen and 15/100 dollars, and on the same day I paid over the sum of Sixty-nine and 15/100 dollars, being the amount of said judgment for penalty and costs to Henry L. Hertz, Esq., Collector of Internal Revenue for the First District of Illinois.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this nineteenth day of May, A. D. 1905.

Seal of Dist. Court U. S. Northern Dist. Illinois 1855.

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois."

Payment of the judgment having been made by the defendant Cliff after the mandate of this court was filed in the lower court, the gist of the Solicitor-General's contention now is, that if this court should grant a rehearing, and upon re-argument should reverse the judgment of the lower court, such reversal could not be carried into actual effect,—in other words, that, having paid the penalty and costs adjudged against him by the lower court, the plaintiff in error could have no relief. The Solicitor-General has not stated why he considers that a reversal could not be made effective. But it may be inferred that, inasmuch as the record does not show that any execution was issued, the payment of the penalty and costs by the plaintiff in error is regarded by the Solicitor-General as a voluntary acquiescence in the judgment regardless of whether the court should thereafter hold it to be erroneous. Not only do the cases cited by the Solicitor-General wholly fail to sustain that view, but the decisions of this and other courts and the weight of reason are directly opposed to it.

Under rule 39 of this court the mandate issued as of course any time after thirty days from the day the judgment of affirmance was entered. The mandate when filed in the lower court nullified the supersedeas and the judgment be-

came immediately enforcible with the same but no greater effect than if there had been no supersedeas. Its enforcement, unless error had been waived by the plaintiff in error, was subject to the power of this court during this term to recall its mandate, reverse the judgment and require or enable restitution. For rule 30 of this court allows the plaintiff in error to present a petition for rehearing at any time during this term; and it would be nothing short of a solecism if obedience to this court's mandate, issued pursuant to one rule of this court, were held to prevent enjoyment by the plaintiff in error of his right to have the court consider on its merits his petition for rehearing duly filed under another rule of this court.

The pivotal question therefore seems to be:

Did the payment by plaintiff in error of the judgment for penalty and costs against him, after the filing of the mandate of this court, constitute a voluntary payment in such sense as to deprive plaintiff in error of the right to have the amount paid back to him in case the judgment were thereafter held by this court to be erroneous? To this question the decisions of this and other courts give plain answer in the negative.

Dakota County v. Glidden, 113 U. S., 222, was a motion to dismiss a writ of error. The suit was on county bonds issued in aid of a railroad. Judgment having been rendered below for the plaintiff, the defendant county brought a writ of error to reverse it. Subsequently to the judgment and while the writ of error was pending, the county made a *compromise* settlement with the plaintiff and other bondholders by giving them new bonds bearing a less rate of interest, and the old bonds, which were the cause of action in the suit, were surrendered and destroyed. These facts were shown to this court by affidavits and transcripts from the county records, in support of the motion to dismiss. The court, speaking by Mr. Justice Miller, said:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a

writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other respect, *its right to prosecute this writ of error would have remained unaffected.*"

Freeman in his work on Judgments (4th ed., § 482) says:

"Upon the reversal of the judgment against him, the appellant is entitled to the restitution from the respondent of all the advantages acquired by the latter by virtue of the erroneous judgment. The successful appellant is entitled to a restitution of everything still in possession of his adversary in specie; not the *value*, but the *thing*. If money has been collected by the plaintiff in the judgment, *whether under execution or not, an action lies against him to recover it back.*" Citing *Scholey* v. *Halsey*, 72 N. Y., 578; *Ex-parte Walter Bros.*, 89 Ala., 237.

In *Scholey* v. *Halsey* the plaintiff had paid money and the defendants had received it after a hearing and decision of the Surrogate that the defendants were entitled to it. No execution was issued. Later the Surrogate's decision was reversed and an action was brought by the plaintiff to recover the money he had paid. The court, speaking by Andrews, J., said:

"The original decision of the Surrogate was doubtless erroneous, and having been subsequently reversed and set aside, the plaintiff was then entitled to recover the money paid under the erroneous order. * * * And it is not necessary in order to maintain the action that the payment should have been coerced by execution. *It is sufficient if it was paid after judgment or adjudication made.* 1 Starkie, 326, 357; *Lott* v. *Swezey*, 29 Barb., 87. The original defendants were bound therefore to restore to the plaintiff the money received under the erroneous decision of the surrogate."

Ex-parte Walter Bros., 89 Ala., 237, was an application for a writ of mandamus directed to a chancellor commanding him to make or show cause why he should not make an order requiring the plaintiff in an original suit to repay the defend-

ants a sum of money which they had paid (without execution) on a decree against them, which decree was afterward reversed on appeal. The court said:

> "We are unable to concur with counsel who appear against the application, that money paid on and in obedience to a decree of the chancery court can, in any case, be said to be paid voluntarily, in such sort as to preclude its recovery in the event of a reversal of the decree. We understand the law to be settled to the contrary." Citing among other cases *Scholey* v. *Halsey, supra; Hiler* v. *Hiler,* 35 Ohio St., 645.

Hiler v. *Hiler, supra,* was a suit to recover money paid by the plaintiff upon a judgment previously rendered against him but subsequently reversed. No execution had been issued on the judgment. The defense was that the payment was voluntary. In sustaining the right of recovery the court, among other things, said:

> "But it is said the payment was voluntary, and therefore Jacob J. Hiler is not entitled to recover. We do not find it necessary to determine what constitutes such voluntary payment of a judgment as will preclude the party paying from recovering back the money paid. An objection like that goes to the question whether the original judgment should have been reversed, and that question is not before us. As the objection is now presented, it is well answered in the language of Lewis, C. J., in *Breading* v. *Blocher,* 29 Pa. St., 347. 'A judgment of restitution given upon a reversal of an erroneous judgment, is conclusive of the matters adjudged by it. It establishes beyond further question the right of the plaintiff in error to be restored in all things which he has lost by reason of the erroneous judgment.' "

In *Converse* v. *Sickles,* 74 Hun, 429, which was brought to recover money paid on a legal judgment *which had not been reversed or set aside,* the court, speaking by Parker, J., said:

> "The general rule is that money paid in satisfaction of a legal judgment cannot be recovered back, though not justly due from the defendant.
>
> *An exception to the rule* is where money is paid in satisfaction of an erroneous judgment, which is subsequently reversed or set aside. In such case the money paid may be recovered back." (Citing cases.)
>
> "And it is not necessary in order to maintain the action

that the payment should have been coerced by execution. *It is sufficient if paid after judgment.*" Citing *Lott* v. *Swezey*, 29 Barb., 87; *Scholey* v. *Halsey, supra; Peyser* v. *Mayor*, 70 N. Y., 497.

In *Peyser* v. *Mayor, supra,* in holding that an assessment for a local improvement, regular upon its face, has the force of a judgment, and that a party paying such an assessment does not pay voluntarily but under coercion of law and could therefore maintain an action upon the subsequent setting aside of the assessment, the court, speaking by Folger, J., said among other things:

> "Coercion by law is where a court, having jurisdiction of the person and subject matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it when execution is attempted, he may as well pay the amount at one time as at another and save the expense of delay."

In *Tripler* v. *Mayor*, 125 N. Y., 617, which was a suit to recover money paid on a *void* assessment for taxes, the recovery was denied because the court found that the plaintiff had had constructive notice of the facts which rendered the assessment absolutely void, but the court, speaking by Peckham, J., approved the doctrine announced in *Peyser* v. *Mayor*, in the opinion of Folger, J.

In *Lott* v. *Swezey, supra*, after discussing various cases, the court, speaking by Emott, C. J., said:

> "These cases are all of them in point to show that the remedies are cumulative, and that the action will lie. I think that they also sustain the position that where money has been collected *or received upon a judgment valid at the time* and binding between the parties, and that judgment has been reversed subsequently, the money may be recovered back, although the payment may not have been coerced by actual duress. We ought not to say that a party must resist the judgment of a court to the last extremity and with what is something like contumacy, if he wishes to preserve his right to restitution in case he succeeds in reversing the judgment. Where a man pays without coercion and with knowledge of the facts of his case, he cannot be heard afterward to say that upon these facts he ought not to have been called upon for payment.

That is undoubtedly the settled rule of law. But that supposes that he claims restitution upon the same state of facts which existed when he paid the money. *When, however, the payment is paid in obedience to the judgment of a court which had determined that he must pay it, and his adversary had the right to demand it of him,* and subsequently a legal tribunal of competent authority adjudges that the first judgment was erroneous, and therefore vacates and reverses it, the conclusion is irresistible that the plaintiff in the first judgment, if he has received its amount, has received what he is equitably and justly bound to restore. The court ought not to refuse its aid to compel such restitution." * * *

"The distinction between such a case, and those where actual duress is required to be shown is that in the latter the plaintiff has paid a demand which was wrongful at the time and he is foreclosed from showing its wrongfulness afterwards unless he was compelled to pay it; *while here the demand was rightful at the time, and so long as the original judgment remained unreversed.* The obligation of the defendant to restore the money was created subsequently when the judgment was reversed, and it is upon that state of facts and that too produced by judicial action that the plaintiff's present rights depend."

As to Restitution.

If it be suggested that a writ of restitution could not accompany an order of reversal in this case because the United States is defendant in error, the force of that suggestion may well be doubted in view of Sec. 3220, Title 35, Chap. 2, R. S., which provides in part as follows:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, *all penalties collected without authority,* and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant,

assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty."

Now since the amount of the penalty and costs adjudged against him under Section 11 of the Oleomargarine Law and paid by him after the filing of the mandate of this court was paid over by the Clerk of the District Court to the Collector of Internal Revenue for the First District of Illinois and by him remitted to the Commissioner of Internal Revenue, it would seem not improper in the event of a rehearing and reversal that a writ of restitution issue against one or both of those officers requiring them to do what the statute authorizes, namely,—to pay back the penalty and costs. But if such a writ could not issue against those officers, the path to relief for the plaintiff in error in case of reversal is pointed out in *Ex parte Morris & Johnson,* 9 Wallace, 605.

In that case the United States had filed an information in the District Court for the Middle District of Alabama against certain bales of cotton which it was alleged were liable to seizure and confiscation and had come into the possession of the petitioners. The court entered a personal decree against them for the value of the cotton. On appeal this court reversed the judgment and remanded the cause with direction to the District Court "to cause restitution to be made to the appellants of whatever they had been compelled to pay under that decree." (*Morris & Johnson* v. *U. S.,* 7 Wall., 578.) And a mandate to this effect was sent to the District Court, and proceedings were instituted to enforce the order of restitution.

The marshal answered that the money had been distributed in accordance with the decree and that he had deposited the residue pursuant to instructions from the Interior Department in the First National Bank of Selma. After stating the facts, the court, speaking by Mr. Justice Swayne, said:

> "Under these circumstances the District Judge was at a loss how to execute the mandate heretofore sent to him and submits himself to this court for further instructions.
>
> The duty of the District Court is simple and obvious and its power ample. The mandate of this court must be obeyed as far as practicable. All the distributees within reach of the territorial jurisdiction of the court, except the United States, must be required by the proper order to refund what they have received. If they fail to do so, they should be dealt with promptly by attachment for contempt. This will in nowise interfere with any other

remedy to which the petitioners may be entitled except that they cannot be paid twice. * * * The circumstances of the marshal's deposit should be inquired into. If the money in question was deposited in the bank of Selma, pursuant to instructions from the proper authority, he is exonerated. In that event the proper certificate should be given by the court to the petitioners and they must be left to seek redress in the appropriate manner. The court has no authority to order the United States to refund."

So in this case if it were held that a writ of restitution could not issue, the lower court, pursuant to the mandate from this court, in case of reversal, could give the "proper certificate" to the plaintiff in error. He thereupon would "be left to seek redress in the appropriate manner." And the appropriate manner would be first to appeal to the Commissioner of Internal Revenue for a refund under section 3220 of the R. S., and if that appeal were denied (as is scarcely to be imagined would occur after a reversal by this court), then to bring suit either against the United States as authorized by statute, or against the Collector or Commissioner of Internal Revenue, or both of them, as the plaintiff in error might then be advised.

So complete and sufficient is the court's power to require restitution to the plaintiff in error upon the reversal of an erroneous judgment, that even where the judgment or decree in the lower court has been reversed because of an entire lack of jurisdiction, the court may make and enforce such orders as are necessary to restore to the plaintiff in error any money or advantage taken from him under such erroneous judgment or decree.

Northwestern Fuel Co. v. *Brock*, 139 U. S., 216.
Morris' Cotton, 8 Wall., 507.

The cases relied upon by the Solicitor-General while they clearly announce the established doctrine that this court is not empowered to declare itself upon merely moot questions, do not seem in the least to support the claim that the payment by plaintiff in error after the filing of this court's mandate in the lower court has left only a moot question in this case.

In *Kimball* v. *Kimball*, 174 U. S., 158, the plaintiff in error claimed to be the widow of Edward C. Kimball, deceased, and as such to be entitled to appointment as administratrix of his estate, which *was then supposed* to be intestate. The issue concerned only the right of administration. Before the

hearing of the writ of error in this court a will of the deceased was discovered and admitted to probate, letters testamentary were issued by the Surrogate Court to the executrices named in the will and the former letters of administration issued to the mother and brother of the decedent were revoked. As this court said (p. 162):

> "The decree admitting the will to probate, in terms, revoked the former letters of administration, and, by its legal effect, superseded the necessity and the possibility of granting any letters of adminstration, as of an intestate estate, to the petitioner or to any one else."

Under these circumstances no possible action of this court on the writ of error could have been carried into effect and therefore the writ of error was dismissed.

In *Tyler* v. *Judges of the Court of Registration,* 179 U. S., 405, the writ of error was dismissed because it did not appear by the record either that the plaintiff in error was a party to, or that his property was in any way affected by, the proceedings before the Judges of the Court of Registration against whom he had sought to obtain from the Supreme Judicial Court of Massachusetts a writ of prohibition to prevent the Court of Registration from proceeding under the Torrens Law to register a certain parcel of land which adjoined another parcel owned by the plaintiff in error.

Hatfield v. *King,* 184 U. S., 162, was a suit by appellee to quiet title to certain lands. No process had been served or issued but counsel's appearance had been entered *without authority* for the defendants, who appealed from the decree entered against them. This court remanded the case to the Circuit Court "with instructions to set aside the decree as well as the appearance of defendants and to proceed thereafter in accordance with law; and also to make a full investigation in such manner as shall seem to it best of the various charges of misconduct presented in the motion filed in this court, and to take such action thereon as justice may require."

California v. *San Pablo & Tulare Railroad, supra,* was a suit by the state against the railroad company to recover sums claimed to be due for taxes. Pending the writ of error brought by the state to reverse the judgment rendered in favor of the railroad company the latter voluntarily (there being no judgment against it) paid the taxes. Under these circumstances

this court dismissed the writ of error, saying among other things:

> "The state has obtained everything that it could recover in this case by a judgment of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it."

In *Mills* v. *Green*, 159 U. S., 651, 657, in dismissing the appeal, the court speaking by Mr. Justice Gray said:

> "In the case at bar the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged, on the third Tuesday of August, 1895. Before this appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing his bill, that date had passed; and before the entry of the appeal in this court the convention had assembled pursuant to the statute of South Carolina of 1894, by which the convention had been called. * * *
>
> It is obvious, therefore, that even if the bill could propperly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted."

The latter two cases, while not cited by the Solicitor-General, are here briefly referred to because extensively quoted from by the court in *Kimball* v. *Kimball*, which is the case chiefly relied upon by the Solicitor-General.

It is respectively submitted that the Solicitor-General's "suggestion respecting the petition for rehearing" gives no adequate reason why this court should not consider the petition for rehearing on its merits and allow a rehearing if the court is now in doubt as to the correctness of its decision announced early this term.

Respectfully submitted,

JOHN MAYNARD HARLAN,

Attorney and Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 19.—October Term, 1904.

August Cliff, Plaintiff in Error, *vs.* The United States. } In error to the District Court of the United States for the Northern District of Illinois.

[October 24, 1904.]

Mr. Justice Brewer delivered the opinion of the Court.

August Cliff was convicted in the District Court of the United States for the Northern District of Illinois of a violation of section 11 of the act of August 2, 1886, (24 Stat. 209,) amended May 9, 1902, (32 Stat. 193.) A judgment for fifty dollars, as prescribed by the section, was entered with an order for collection by execution. That judgment was brought directly to this court by writ of error. The constitutionality of the oleomargarine legislation and the right to waive a trial by jury in petty criminal offences were affirmed in *McCray* v. *United States*, 195 U. S. 27, and *Schick* v. *United States*, Id. 65. Nothing need be added to the opinions in those cases on these questions.

There is in this case a further question. Section 2 reads:

"Sec. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

In section 8 is this provision:

"Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound."

By section 14 the Commissioner of Internal Revenue—

"is authorized to decide what substances, extracts, mixtures or compounds, which may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Defendant was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law—that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley."

It was shown that the tax of ten cents per pound had not been paid, that the package contained ten pounds, that its ingredients and their proportions were: Three pounds of oleo oil; one pound and twelve ounces of neutral lard; two pounds of cotton-seed oil; one pound and fourteen and a half ounces of milk; one pound and four ounces of salt; one and one-half ounces of palm oil. In other words, out of one hundred and sixty ounces, only one and one-half ounces were palm oil. There was introduced in evidence a ruling of the Commissioner of Internal Revenue as follows:

"This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of ten cents per pound."

Now the contention is that Congress having by section 2 named the possible ingredients of oleomargarine, the coloring given to a compound of some or all by the use of one of the named ingredients is a natural coloring, and not an artificial coloration subjecting to a tax of ten cents per pound. In order that the precise contention may be understood we quote the following from one of the briefs filed for plaintiff in error:

"By parity of reasoning, when one is speaking of oleomargarine, natural coloration means a coloration due to a natural ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the nature of oleomargarine. If the color-giving ingredient be a natural, that is, a statutory ingredient of oleomargarine, then how can it be truly said that the color

caused by such ingredient is 'artificial coloration' merely because the quantity of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color? Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a statutory, or, so to speak, a natural ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as, for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when, by reason of his arbitrary classification, based upon the quantity of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a substantial part of the finished product, it is conceded that the tax would be only one-fourth of a cent per pound?"

We do not undervalue the force of this argument, but, as applied to this case, hold that it cannot prevail. It is true that under the last clause of section 2 oleomargarine includes "all mixtures and compounds" of the substances named, "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, "and other coloring matter." The purpose in so including "coloring matter" is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this it is rightfully styled an artificial coloration. Otherwise the proviso practically nullifies the body of the section. For "other coloring matter" includes all coloring matter, at least all of the nature of those named; and hence the addition of any coloring matter would produce only a natural and not an artificial coloration, and thus relieve the product from the ten cent tax. It will be noted that the regular tax imposed upon oleomargarine by section 8 is ten cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it clear that his oleomargarine is within its scope. That exception is "when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow." Bearing in mind also that one of the pur-

poses of this legislation was to prevent the sale of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to "look like butter of any shade of yellow," it is an artificial coloration.

Whether the Commissioner of Internal Revenue has all the authority which is in terms committed to him by section 14 need not be determined. The letter containing his ruling was admitted in evidence without objection. Irrespective of such ruling, and upon the other testimony, the judge who tried the case, and whose decision must be considered as equivalent to the verdict of a jury, could rightfully have found that this package of oleomargarine was artificially colored by the small amount of palm oil used in its manufacture. A witness testified that he called at the place of business of the defendant, "and found this ten-pound package of oleomargarine, which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax paid stamp of one-quarter of a cent a pound." Other witnesses testified to the exact per cent of palm oil used in the preparation of the package. One said that "the article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the 'Daisy grade,' the lower grade. It is a substitute for butter." Another testified that "a very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such that it may be used to make oleomargarine or white substances to look like butter." Further, the defendant offered quite an amount of testimony, which was received by the court and afterwards on motion stricken out as irrevelant and immaterial. Included in this was that of the secretary of the manufacturer, who testified that "before July 1, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have used the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten cent tax."

The verdict of a jury is conclusive upon a question of fact unless plainly against the evidence. The same weight, as we have said, must be given to the finding of a court, and upon the testimony received without objection a finding that this palm oil served substantially only to color the product cannot be disturbed. Indeed the fact was made certain by the testimony offered by the defendant, although that testimony was afterwards stricken out by the court as immaterial.

We see no error in the record, and the judgment is *Affirmed*

The CHIEF JUSTICE, Mr. Justice HARLAN and Mr. Justice PECKHAM dissented.